Mr. Gallagher: Your Honor, I think that is all.

307–351 Thereupon,

DR. HEINRICH KRONSTEIN, called as witness on behalf of the plaintiff, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boland:

Q. Will you state your full name and profession, Doctor? A. My name is Heinrich Kronstein. I am professor of law, Georgetown University Law School. I am a member of the Bar of this Court.

Q. Would you state briefly your educational background? A. After elementary school in Gymansium—that means high school.

Mr. Burling: I think if we could save time, Your Honor—I myself have called Dr. Kronstein as an expert in German law, and I fully concede he is such an expert.

Mr. Boland: If Your Honor please. We would not agree to a statement of this man's qualifications. We think the Court should have the benefit of a statement of his qualifications.

352 Mr. Burling (to Mr. Boland): I was just trying to help you.

By Mr. Boland:

Q. Would you state briefly your educational background, Doctor? A. After elementary and Gymnasium, meaning high school and junior college, in Baden, Germany and after two and a half years in war service, in the First World War, I studied law at the University of Heidelberg, in Baden.

When I passed my first bar examination in the State of Baden, I passed through the three years of referendar time, which means an apprenticeship in the court.

Q. And what does that mean? A. That is, under the German system, the study of law is three years in the university, and then three and a half years, at least, in the State of Baden, of practical experience in the administrative agencies, the courtrooms, and the law offices.

Q. And when were you admitted to the practice of law, Doctor? A. 1924.

Q. And then? A. Then I went to Berlin and passed there my Doctor's examination at the University of Berlin, Doctor of Law.

Q. And after that? A. That was my legal education under civil law.

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Then in 1936 I began to study common law in the Columbia Law School in New York.

Q. When did you first come to America, Doctor? A. December, 1935, and studied there until 1939, where I received the degree of L.L.D., and came to Georgetown and received the degree of S.J.D., and became professor of law in 1940.

Q. Have you had any experience, Doctor, in the field of actual practicing of law? A. Certainly.

Q. How long did you practice law, Doctor? A. I first, after my second bar exam, it was the practice in my home state, Baden, I was appointed Gerichts Assessor in charge of one of the sections of the Municipal Court of the City of Mannheim.

Q. Was this immediately after you passed your bar examination? A. Yes, sir.

Q. Was there any special significance to that appointment? A. In the State of Baden, it was a merit appointment.

Then I began to practice law in 1926, and practiced law in the City of Mannheim until November, 1935.

Q. At which time you came to America? A. Yes.

354 Q. And other than going to Columbia University Law School, Doctor, what have you done in the field of law in the United States? A. I was called as an expert of the Department of Justice since 1936, to 1940, or 1939. In 1939 I came to the Department of Justice on a per diem basis, since I was not a citizen at this time. I became an attorney in the Department of Justice in 1940, and was in the Department of Justice Anti-trust Division in the problems of international cartels and foreign law, until 1946.

Q. And when did you first come to Georgetown University Law School? A. I made my Doctor there, from 1939 to 1940, and became Professor then, first of comparative law, and full Professor since 1947; and teach corporation law, bankruptcy, and international private relations.

Q. Have you ever previously testified as an expert on German law? A. Yes.

Q. Doctor, would you explain briefly why you came to America in 1935? A. I left Germany first, because I am, to speak in the Nazi terminology, of the Jewish race; second, because I opposed Naziism.

355 Q. Doctor, I show you now Plaintiff's Exhibit 5 and ask whether or not you have had an opportunity previously to examine this document. A. I did, yes.

Q. What does this document purport to be? A. It purports to be a gift contract.

Q. And does it purport to be an executed gift contract? A. Yes, it purports to be executed.

Q. In using the words "gift contract," Doctor, do these have any special significance under German law? A. Yes. A gift contract is one of the contracts discussed and defined in the Civil Code, the Burgerliches Gesetzbuch.

Q. Would you spell that, Doctor, please? A. B-ü-r-g-e-r-l-i-c-h-e-s G-e-s-e-t-z-b-u-c-h.

Q. And is that what is commonly referred to as the German Code? A. Yes, that is the German Code.

Q. What is the significance of the German Code in German law? A. Germany is one of the so-called civil law countries. In 1896 the law was codified, the private law was codified, and overhauled. If you today study a question of private law, you look first to the Code. But you have to keep in mind that since 1896 the law developed,
356 and you have to consult the decisions of the courts, just as you do here.

In addition to that, you have to consult the commentaries and the textbooks, which have much more significance in Germany than they have here.

Q. Is the word "gift" defined in the German Code, Doctor? A. Yes, it is.

Q How is it defined? A. In Section 516 it is defined.

Q. And what is the definition? A. It says a gift is some delivery or some giving by which anyone enriches himself out of the gift of someone else, provided both parties agree that there shall be no consideration.

Q. So that, basically, a gift is defined as the transfer of property without consideration? Would that be a true statement? A. No; I don't like the words "transfer of property." A gift is a contract under German law. Under American law, a gift is a part of property law.

Under German law, a gift is a contract; and you find, if you look in the Code Section 516, you find it in the second part of the code. The first part of the Code contains the general rules, whether a person has legal capacity.

The second part of the Code has the personal
357 contractual relations, or tort relations—such as a claim I have against you, personal relations, which have nothing to do with any right in rem.

The third part deals with property law, personal and real, and all relations between a person and the goods, the real and personal property.

The fourth part is family law, and the fifth part is inheritance.

Q. Referring to a gift contract, Doctor, is it true that such a contract is without consideration— A. Yes, it is.

Q. —as we understand it in American law? A. German law does not know the concept of consideration. It is perfectly possible that a contract exists without consideration.

Q. Well, it is true that the promisee under a gift contract could sue for specific performance? A. Yes. I don't like the words "specific performance." That has too much of a technical meaning in American law.

Q. Could the promisee require performance? A. Yes—require and demand performance. If I make a contract, sales contract, or whatever contract I make, and the contract is not performed, I can sue in law for the performance.

Q. Even though it is a promise to give a gift? A.
358 Even though it is a promise to give a gift.

Q. Are there any special requirements for such a contract, under German law? A. Yes.

Q. What are they? A. The gift contract has to be in a solemn form, meaning in a form authenticated by a notary. But a notary shall not be compared with an American notary public. A notary, in the different parts of Germany, as position. In some states they are judges, people of judges' positions. In my home state, Baden, for instance, one of the notaries was appointed member of the Supreme Court of Germany. And in other states, you find distinguished lawyers of experience in the writing of documents, when they are over age, appointed notaries.

Q. What are the general purposes of a notary in Germany, Doctor? A. He has two principal purposes, at least in south Germany, where that, I believe, took place. He has one purpose he has everywhere in all Germany, to operate as a document officer, and to authenticate the document, or only to verify the signature.

His second purpose, in south Germany, is that he has many assignments such as you find here in the probate court.

Q. In the probate court? A. Yes.

359 Q. Assuming, therefore, a promisor to make a promise in respect of a gift to a promisee, then as I understand your testimony, it is that after that contract is notarized, the promisee can require performance under German law? A. Yes.

Q. Is there a distinction between that and American law in that respect? A. No doubt.

Q. That is the only distinction? A. The distinction is that, as far as I say, under the American law, a gift is no contract. Therefore the concept is different.

I am now teaching comparative law for eight years, and I learn I should never say that this, in the American law, is equal to this, in the German law, because it is finally generally not the case.

Q. You have testified, I believe, Doctor, that the promisee can require performance of the promisor on the gift contract, if notarized? A. Yes.

Q. Is that defined or set out in the German law? A. Yes; you will find two clear statements to the effect that the German Code—which is more a masterpiece in logic than in practical law, and is brought up in an entirely

360 logical line—you will find in the introduction to all types of contracts, such as sales or gifts, you find again some general rules.

And in this general rule you find right at the beginning of the general rule, in Section 241, on the basis of any obligatory relation, the creditor is entitled to demand that the debtor perform. That is one basis, so that the donee can ask for it.

But you find, furthermore, by indirect way, if you look, for instance, in Section 519, there it says the donor is entitled to refuse the performance of his promise, if by the performance he would endanger his standard of life.

This provision that he can refuse in a specific case certainly shows that as a rule he can ask for the performance of the gift.

Q. Now, Doctor, I believe your testimony thus far is to the effect that under German law two people can enter into a contract in respect of a gift, and that the promisee can sue the promisor for performance, if that contract is notarized. A. Yes, sir.

Q. Is that true? A. Yes, sir.

Q. Let us assume that the contract was not in fact notarized, is there any provision under German law
361 which would cure this formal requirement? A. Yes, there is.

Q. What is that, Doctor? A. In Section 518, Section 1, the statute provides that the notarial or judicial authorization of the gift is necessary; and then it says, in 518, Section 2, it says a deficiency of the form might be cured by the actual performance—or by, but, more literal, by actual delivery as promised.

Q. In other words, Doctor, if we were to make a contract in respect of this particular chair, and you agreed to give me the chair, as a gift, and we had words of promise on your behalf and acceptance on my behalf, and that were notarized, then I could require you to perform the contract? A. Yes.

Q. But if that were not notarized, I would have no right against you except that by your actual delivery of the chair to me, the gift would be completed and the contract good? Is that correct? A. By the act of delivery, the gift contract becomes valid. For instance, if you have a gift contract in written form or in oral form, which contains many provisions other than just the promise to give and to accept, the whole gift contract becomes valid as soon as the performance took place.

Q. Directing your attention now, Doctor, to Plain-
362 tiff's Exhibit 5, this document here—and that is an English translation, I believe, is it not? A. Yes. Could I have the German text?

Q. Yes. A. What is your question?

Q. I haven't asked a question yet, Doctor.

And directing your attention to page 1 of the Exhibit 5, would you point out and read to the Court in English first, whether or not there are words of promise.

Answer the question, first, whether or not there are words of promise; and, if so, read these words. A. Before I do that, I might say a word in regard to the relationship between promise and delivery.

The German law makes a very sharp distinction between what it calls Obligatorischer Vertrag. That is the contract by virtue of which personal obligations come into existence.

For example, I make a contract to buy a pair of shoes; I promise to pay $10. The shoe seller promises to sell the shoes. The German law makes a very sharp distinction between this contract, called Obligatorischer Vertrag, and the delivery of the shoes.

The delivery of the shoes, under German law, is independent from the contract itself. If, for instance, the delivery of the shoes again being considered a contract, I, as the seller, offer to you, the buyer, to transfer the prop-
363 erty and the title in these shoes to you, and you accept the title in the shoes, that is again a contract.

If you take a document such as this, you have to find out how much of this contract is of Obligatorischer Vertrag character, establishing relations in person, in personam, and how much it has to do with the so-called Dinglicher Vertrag.

Q. Do I understand you correctly, Doctor, that what you have just stated is basically that in each gift contract there are really two contracts, after it has been executed? A. After it has been executed, there are two contracts?

Q. And one is the— A. The so-called Obligatorischer Vertrag, and the other is the Dinglicher Vertrag.

The Obligatorischer is all the relations covered by the second book of the Civil Code—the contract of sale, the contract of gift, the contract of rent.

Then if the contract is made in which I promise to sell; the other fellow accepts; then the contract has to be made under the third book of the Civil Code, in which I transfer the title.

These two contracts are separate, to the extent that one of them might be void without making the other void. The Obligatorischer Vertrag might be void; the Dinglicher Vertrag remains valid.

There are other cases I can give you.

364 Q. Directing your attention, Doctor, to the first page of Plaintiff's Exhibit 5, in order to bring some of this testimony down to a practical basis, are there words of promise set forth in the October 5, 1931, draft, the Plaintiff's Exhibit 5? A. Yes.

Q. Would you read those words to the Court, please? A. In the second paragraph—

"In view of the premises I, with the consent of my wife, make a gift from our community property to my son Fritz von Opel of the shares owned by us and mentioned above of the Adam Opel Aktiengesellschaft in Ruesselsheim, Main, Nos. 1 to 600, having a par value of RM 6,000,000,00 (six million). These stocks are deposited at present with the bank."

That is the promise to transfer.

Q. That is the promise to transfer? A. Yes, the promise to make the gift.

Q. By the way, Doctor, would you direct your attention to the original of Plaintiff's Exhibit 5 and explain what the meaning of the German equivalent of community property is in Germany? Is it similar to our use of community

property in America? A. The German law on community property is one of the most complicated parts of the law.

But for the purposes of reading such a contract as
365 this, I think I can state it; that is simple.

Q. It has been stipulated by the counsel for the defendants that the property here in question was jointly owned by the mother and father. A. Yes.

Q. Still on page 1 of the gift agreement, Doctor, are there words of acceptance on behalf of the donee? A. Yes—"I, the undersigned Fritz von Opel, accept the gift."

Q. If I understand your testimony correctly, if they were notarized, Fritz von Opel, the donee under that gift agreement, could require performance from the donors, the father and the mother. Is that true? A. Yes, he could.

Q. Assuming it is a fact, Doctor, that this gift agreement was not actually notarized, are there any words on the first page of this contract which would cure the defect from the standpoint of this Dinglicher Vertrag to which you referred; and, if so, would you read the words? A. On the last paragraph of this page, I see the sentence:

"I, Wilhelm von Opel, herewith transfer title to these shares to our son Fritz von Opel by assigning to him our claim for the delivery of these shares to us."

366 Q. Is it your opinion that these words are words of actual conveyance, actual transfer, Doctor? A. Yes, certainly, they are.

Q. And what effect would they have, Doctor?

Mr. Burling: Just a moment, please.

I won't object more than once, Your Honor. I take it that it is understood that the Doctor's opinion is being asked on the basis of an assumption that this is a bona fide contract.

Mr. Boland: Oh, yes, yes.

The Witness: Here on the question whether there is or is not a sufficient transfer of property, we have to consult the third book of the B.G.B., where we find the chapter on the acquisition and loss of personal property.

There the general rule is established, in Section 929, that the transfer of title in personal property requires that the owner delivers possession to the person who acquires it, and that both parties agree that title is passed, that is, the Dinglicher Vertrag.

Now, that is the rule, the general rule, the usual rule, how the title in personal property passes.

But, in Section 931, there is a rule dealing with a case that the seller or the donor is not himself of the goods. He wished to transfer title. He can do so by assignment of his claim against the depository, to the donee
367 or to the the buyer. It reads:

"If the third person possesses the goods, the transfer might be substituted by an assignment of the owner to the other person required."

And by the assignment of what? By the assignment of the claim for the delivery of the goods.

Q. Would you now direct your attention and re-read those words of conveyance, Doctor, and read them aloud? A. (Reading): "I, Wilhelm von Opel, herewith transfer title to these shares to our son Fritz von Opel by assigning to him our claim for the delivery of these shares to us."

Q. And from what you have just read, from the German Code, it is your opinion, as I understand it, is it not, that actual title to the 600 shares of stock passed by words of conveyance set forth in the words you have just read? Is that true?

Mr. Burling: Again, on the same assumption that this is a bona fide agreement.

Mr. Boland: I think that is understood, Mr. Burling.

Mr. Burling: All right; I won't make it again.

Of course, I think it is understood that an expert witness cannot testify to an ultimate fact, is it not, Your Honor?, I mean, this witness has no knowledge of what happened on October 5, 1931.

The Court: As I understand, he is testifying on
368 the state of the law with regard an instrument on its face. That is what I understand.

Mr. Burling: Yes, Your Honor.

The Witness: This document purports to give two things:

Number one, the promise to give, and the acceptance to take; and

Number two, the full transfer of the title in the shares.

Mr. Boland: Let us get these assumptions of Mr. Burling clear, Your Honor. The assumptions I will concede are these, and only these: that Dr. Kronstein is testifying on the assumption that this is an actual contract which was entered into between Fritz von Opel, his mother, and father, on October 5, 1931. I grant no other assumptions.

Mr Burling: The assumption that the parties intended to contract as indicated by the paper.

Mr. Boland: I am having Dr. Kronstein testifying that this document, being an original, valid, gift agreement, testify to what the words mean under German law; and that is all.

By Mr. Boland:

Q. Now, is it your testimony that if this contract was actually entered into between Fritz von Opel and his mother and father, and if the only thing before you were page 1 on this agreement, that title passed to 600 shares of Opel stock? A. Yes, that is my opinion.

369 Q. Under German law? A. Under German law, the title passed.

Q. And title passed, as I understand you, even though this is an assignment of a claim against a third person, because under German law you may have the power to substitute a claim which you have against a third person in possession? Is that true? A. Yes.

Q. So that, getting back to the chair, Doctor, you have words of promise by the donor, the promise to give; and words of acceptance by the son, "I accept." That is the Obligatorischer Vertrag? A. Yes.

Q. And "Vertrag" means contract? A. Yes.

Q. Now, you have also read words of conveyance, words of transfer of title, in other words, of handing over the shares from one to the other? A. Yes.

Q. And those words are present? A. Yes.

Q. And that is what you call Dinglicher Vertrag, meaning contract? A. Yes.

370 Q. And all that is necessary for a Dinglicher Vertrag is an actual transfer or handing over, with the intent that the title pass? A. With the intent that title pass, and the acceptance of the intent.

Q. Right. So that it is the Dinglicher Vertrag, the actual transfer of title, which cures the effect of the lack of notarization, if that is a fact that this was not notarized? A. Yes, certainly.

Q. Now, Doctor, I direct your attention to the first paragraph on page 2, and would you read that aloud to the Court, please, from the English translation? A. (Reading): "The usufruct in the shares is not assigned to Fritz von Opel. It remains with Wilhelm von Opel and his wife, hereafter called the parents Opel, until the death of the survivor of them. However, 20 per cent of all dividends and interest received will accrue to Fritz von Opel."

Q. Would you give us your opinion, Doctor, whether that language would have any effect on the passage of

title, to which you have just indicated or testified to? A. Would you permit me to read the whole page again?

Q. Yes. A. To see whether there are—

371 Q. Certainly. A. No; that has no effect on the passing of title.

Q. Would you explain why you make that statement, Doctor? A. German law doesn't know the idea of equitable or legal interests in the same way the American and English law knows it.

If you transfer title in personal property or in real property, you can only transfer the whole title. You cannot transfer half of the title. You transfer the title, and the title passes.

Therefore I don't see how, if you take page 1 together with this section, how we can come to the conclusion that the effect of this contract is that something remains, as a matter of property law, in the hands of the parents. Title passed.

Q. Your testimony is, Doctor, is it not, that because of the language on page 1 of the gift agreement, the promise to give, the acceptance, and the actual transfer, that title passed? A. Yes.

Q. And that title passed absolutely and unqualifiedly? A. Up to this point, you gave to me up to now, it says nothing which could establish anything else but a complete transfer of title.

Q. Well, what I am trying to get to, Doctor, is that your testimony on German law is that if title passes,

372 title passes completely and absolutely. Is that right?

A. There are situations; for instance, I have a picture. I give you this picture, this specific picture, and we agree, in case of your death, this picture shall go back to me. That would be a possible condition. The title would pass to you, but it would be a condition of the return of this particular, specific picture to me after your death.

Therefore I hesitate to make such a broad statement as you suggest, because of this case I have in mind.

Q. Well, how broad is the German law? A. But title passes, but if title passes in this case, nothing remains in the donor of equitable or legal interest in the matter.

This one case which hinders me to say all the title passes absolutely, because you use the word "absolutely," because of this one case I mentioned.

But if we understand you have not in mind this condition which I here refer to, with this understanding, the title passed absolutely and fully, and gives complete power over this property to the donee.

Q. Getting back to the gift agreement, Doctor, therefore your testimony is, is it not, that title passed absolutely and unqualifiedly, as a result of the words on page 1, and that your reason why the first paragraph on page 2 does not in any way affect passage of the title is because
373. of the German law in cases such as this, where title passes; that in such cases, the title passes absolutely? A. Yes.

Q. Would you direct your attention to the next paragraph, Doctor, on page 2, and read that to the Court? A. (Reading): "If the parents Opel should predecease Fritz von Opel, the above described gift shall be considered as an advancement and shall be deducted from his share in such property as might be inherited by him or his sister, Mrs. Elinor Sachs, nee von Opel, or in case of her prior death, by her issue."

Q. And the next paragraph? A. (Reading): "For this purpose the value of the shares shall be fixed as the value at the time when the duty to account for the advancement arises."

Q. And the third portion of it? A. (Reading): "If this value is higher than the present value, the higher value shall apply, if it is lower, then the lower value."

Q. Do these paragraphs which you have just read, Doctor, in any way affect the passage of title? A. No, not at all.

Q. Would you read the next paragraph aloud, please? A. (Reading): "In the event that the parents Opel shall not have drawn in full or in part the income from
374 the shares accruing to them by virtue of their usufruct, the advancement to Fritz von Opel shall be deemed to have increased by the income not drawn and he shall be accountable therefor."

Q. Does this paragraph in any way affect the passage of title, Doctor? A. No, certainly not.

Q. Would you read the next paragraph aloud? A. (Reading): "If the shares should be sold or exchanged against other property the proceeds from such sale or the property taken in exchange shall be substituted for the shares, after the usufruct of the parents Opel has been safeguarded. All provisions stipulated above will then fully apply to such substituted property."

Q. Does this paragraph in any way affect the passage of title, Doctor? A. No.

Q. Would you read the next paragraph, on page 3? A. (Reading): "If Fritz von Opel predeceases his parents without leaving legitimate issue, the gift executed by this document will become void. The stocks or the property substituted therefore including the income accrued but not drawn will then revert to the parents Opel or the surviving parent."

Q. Does this paragraph in any affect the passage
375 of title, Doctor? A. This question cannot be answered either yes or no. I mentioned before that, for instance, in the case of a picture, a Rembrandt, which I gave to someone title, with the understanding that it shall go back if the donee dies, there the title would pass, but it would be a permissible condition of dissolutive character, a condition which might dissolve title in the case of death.

However, here, we don't deal with a specific picture. Here we deal with shares which can be exchanged, and the contract speaks of exchange into something else.

The German property law is very exact. This property cannot be clearly specified and defined, such an agreement, as we read here, has no effect on the passing of the title and does not establish a condition of the transfer, because at the time of the death the property might be mixed with a hundred other matters. And therefore I cannot see that this section has any effect on the passing of title.

Q. Therefore, in answer to my question as to whether this paragraph has any effect on the passage of title, your answer it what? A. No.

Q. Doctor, you will agree that all this language means something? A. Yes, certainly.

376 Q. This language starting at the top of page 2 and going through page 3? A. Certainly; every word has a very clear—I might say, not clear—a very obvious meaning.

Q. Well, let us start with, for example, what is the meaning of the first paragraph on page 2? A. (Reading): "The usufruct in the shares is not assigned to Fritz von Opel. It remains with Wilhelm von Opel and his wife, hereafter called the parents Opel, until the death of the survivor of them. However, 20 per cent of all dividends and interest received will accrue to Fritz von Opel."

With all proper deference to the man who drafted this contract, it is not a masterpiece of writing law. If you interpret a German contract, you do not just look on the word, and if you see the word "usufruct," you take the word and look in the index under "usufruct," and find that, and think that is what the parties did.

We have to apply two basic rules of interpretation. The first rule is that under German law, different from American, the objective statement of the parties governs.

If I say, "I transfer this ring to you," believing the ring is not just a Woolworth ring, but it is gold, the objective test, the objective words, have to be looked on. Under

Section 133 of the Civil Code, this objective test
377 has to be interpreted within the meaning of the intention of the parties, and the practice of life.

Q. So— A. And let me state one further rule of interpretation. The rule of interpretation is that the contract shall be so interpreted that the contract can be performed, and as much as possible of the words used in the contract can be given a meaning as much as possible and as close as possible to the intention of the parties.

Q. Directing your attention to paragraphs 2, 3, and 4, Doctor, would you explain— A. Paragraph 3?

Q. 2, 3, and 4 (indicating). A. Yes.

Q. And would you explain generally and briefly what these paragraphs mean, Doctor, under German law? A. These paragraphs are easily explained. Under Section 2050, that is, in the fifth book of the law on inheritance, it is provided that whenever a deceased has made gifts to the heirs, to one of the heirs, that this gift has to be reported.

Let me give a case, if you permit. A father has two children. He dies in December, 1948. His estate is one million dollars. He has given a gift two years ago, two years before, to the child B, a gift of two hundred thou-
378 sand dollars. Now, in the distribution of the estate, the child has to report this gift, if the deceased has required so in the gift, as he has done here.

If he reports—you take the estate of one million dollars, and add to this estate two hundred thousand dollars, and you have one million two hundred thousand dollars; and you divide that into two parts. And son A who had already two hundred thousand, which is four hundred thousand; and the other gets the six hundred. So there is, again, the one million.

So that is what this section means, and that is what here is requested, that Fritz von Opel, in case of the death of his parents, reports this amount in the distribution of the estate of the parents.

Q. Do I understand your interpretation or your reading of the German law provisions, Doctor, that unless the donor in a gift agreement or in a gift makes a specific provision for that type of accounting, that the example you just gave would not take effect?

In other words, it would not be accounted for unless specifically provided for in the gift itself? Is that true? A. In this type of gift, yes; specific provision is necessary. There are other types we do not have to deal with here, where it is not necessary.

379 Q. And, as a German lawyer, that is your understanding of the purpose of those paragraphs? A. Yes.

Q. Doctor, I think the example you gave was the example where we assume the child got an amount less than the amount of what his inheritance would be. A. Yes.

Q. Let us assume the child's gift was actually greater than what he would have gotten in the distribution after the death, what are the provisions in the German law in such a case? A. For instance, if what you mean, if I have my example—

The Court: Suppose in this case he had drawn six hundred thousand dollars, and there is a million left; what happens then?

The Witness: Then you make the same kind of arithmetic to find out how much he gets. But the statute expressly provides that the child who has received more than his share has nothing to return—an expressed provision of section—

The Court: That is the same thing the other witness said.

Mr. Boland: Yes, sir. But he wasn't testifying as an expert on German law.

By Mr. Boland:

380 Q. Therefore, as you read the provisions on page 2 of this gift agreement, under German law, in no set of circumstances, regardless of what the amount of this gift is, what relation that bears to the final, ultimate estate of Wilhelm von Opel, would Fritz von Opel be required to return any amounts of money for distribution? A. No. He would not be obliged to make any payments to the estate or to Mrs. Elinor Sachs, or to anyone else.

Q. So that these provisions are merely arithmetic calculations for the purposes of testamentary disposition, and only that, and do not in any shape, form, manner, or way create any claim against Fritz von Opel? Is that true? A. Yes, that is true.

Q. Directing your attention to the fifth paragraph on page 2, read that aloud, would you, for the benefit of the Court, and explain what that means? A. (Reading): "In the event that the parents Opel shall not have drawn in full or in part the income from the shares accruing to them by virtue of their usufruct, the advancement to Fritz von Opel shall be deemed to have increased by the income not drawn and he shall be accountable therefor."

Q. Can you give me any light on how that would be interpreted under German law, Doctor?

The Court: Don't you agree the word "not" should
381 be inserted in there?

The Witness: No; he should be accountable, because the idea seems to me that all of the Opel parents under this contract might have a claim for 80 per cent, if they only take 20 per cent a year, or take nothing. And then that is to be considered, in addition, a gift.

The Court: That is right. I understand that.

(To counsel): Didn't you agree the other day that the word "not" ought to be there in front of "be"?

Mr. Boland: No, sir.

Mr. Gallagher: There is no mistake or difference on the question of the language of this, Your Honor.

The Court (to Mr. Burling): Didn't you?

Mr. Burling: No, sir. I didn't think either side thought the word "not" should be in there.

The Court: Let me read it.

I see; I understand.

By Mr. Boland:

Q. And this, too, is in connection with the testamentary accounting; the use of the word "accountable" there? A. Yes, it is—for the same reason.

Q. And what relationship, or how would that particular paragraph affect the rights of the donee under this contract? A. The rights of donee?

Q. Yes. Does that create a right of any sort,
382 nature, or kind, against the donee? A. No, certainly not.

Q. I direct your attention to the next paragraph.

The Court: Gentlemen, I think that is a rather important paragraph, and I believe I will have to stop at this point. You will probably take some little time on this, will you not?

Mr Boland: Yes, Your Honor; we are coming to a rather lengthy one.

The Court: This next one will probably be the controlling one, won't it?

Mr. Boland: No; that will be with respect to the first paragraph on page 2, Your Honor.

The Court: All right. It certainly seems to me that it is very important.

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DR. HEINRICH KRONSTEIN resumed the stand and was examined and testified further as follows:

Direct Examination. (Continued)

By Mr. Boland:

Q. Dr. Kronstein, as we adjourned on Friday, I believe you had testified, in respect of Exhibit 5, the gift
387 agreement dated October 5, 1931, that the language on page 1 of this exhibit set forth a promise to give, on behalf of the father and mother von Opel, and an acceptance of that promise by the son; and, on the assumption that that was not notarized, that, as I understood your testimony, was not an enforceable obligation, those two things constituting what is known as an Obligatorischer Vertrag.

You further testified that at the bottom of the page were words of actual conveyance of title, which you referred to as the Dinglicher Vertrag. Is that right? A. Yes.

Q. You further testified that under German law, the transfer of title through the Dinglicher Vertrag cured the lack of notarization in the Obligatorischer Vertrag. Is that right? A. Yes.

Q. And I believe that you testified that the title absolutely passed as a result of the language on page 1 of that exhibit. Is that right? A. Yes.

Q. Then we went on page 2 and described very generally the language in the first paragraph of page 2, that is, in connection with the reservation of certain rights on behalf of the donor. Is that right? A. Yes.

388 Q. And we had gotten through the testamentary accounting provisions in paragraphs 2, 3, and 4, on page 2 of the English translation. Is that right? A. Yes.

Q. And I believe that the fifth paragraph on page 2 is the place at which we adjourned. You had not gone into that particular paragraph. Is that true? A. Yes.

Q. Would you read aloud, Doctor, the fifth paragraph on page 2? A. (Reading): "In the event that the parents Opel shall not have drawn in full or in part the income from the shares accruing to them by virtue of their usufruct, the advancement to Fritz von Opel shall be deemed to have increased by the income not drawn and he shall be accountable therefor."

Q. So that paragraph, Doctor, related to the first paragraph on page 2? A. Yes.

Q. Would you prefer to discuss that paragraph in connection with the first paragraph on page 2? A. Yes; it cannot be explained otherwise.

Mr. Boland: Your Honor, it is our belief that the Court will have a clearer presentation of the problems involved in this particular contract if we discuss this paragraph with the first paragraph on page 2. So, with Your Honor's permission, we will skip that paragraph and go on to the next paragraph on page 2.

389

By Mr. Boland:

Q. Will you read that, Doctor? A. (Reading): "If the shares should be sold or exchanged against other property the proceeds from such sale or the property taken in exchange shall be substituted for the shares, after the usufruct of the parents Opel has been safeguarded. All provisions stipulated above will then fully apply to such substituted property."

Q. Would you explain the significance of that paragraph under German law, Doctor? A. I think that this paragraph, too, cannot be explained and discussed without going into the first paragraph on page 2.

Q. So that when we return to the first paragraph on

page 2 we will also consider the fifth and sixth paragraphs? Is that true? A. Yes, sir.

Q. Would you read the first paragraph on page 3, Doctor? A. (Reading): "If Fritz von Opel predeceases his parents without leaving legitimate issue, the gift executed by this document will become void. The stocks or
390 the property substituted therefore including the income accrued but not drawn will then revert to the parents Opel or the surviving parent."

Q. Would you explain briefly what is contemplated by such a paragraph, under the German law? A. I already, on Friday, answered your question, whether this section has an effect on the transfer of title.

Q. You stated that it did not? A. That it has not. And I discussed that more in full, and it will become clearer as our discussion proceeds. But this section, too, cannot be separated altogether from the first section on page 2. It has to be seen altogether at one time.

Q. Would you repeat what you said on Friday, for the benefit of the Court, as to what your interpretation of that paragraph was? A. I said that there are cases in which the transfer of property, personal property, can be under a condition. For instance, I give a Rembrandt picture to my friend, with the understanding that the property falls back to me if this friend dies.

There it is perfectly clear that here is one specific piece of property; and, if he dies, the condition occurs and the property goes back.

In this case, however, especially after we have
391 discussed the usufruct idea, we will not end the discussion before we come to what shall be a substitution of property. Mr. Fritz von Opel, if this usufruct did not hinder him—and it didn't—to sell the shares and to buy other shares or buy houses, or pictures, or have a good living on it, then it is absolutely impossible, at the moment of his death without legitimate issue, to find out the specific piece of property on which this depends.

Therefore we cannot compare the case of the picture, with this case; and therefore this provision has not the meaning to establish a conditional transfer of title. It is something else.

Q. Does the preceding paragraph give you a clew upon which you base your conclusions? A. The preceding paragraph, again, only in connection with our discussion of the usufruct, because I cannot separate the question of the power of Fritz von Opel to sell and exchange again to other properties, from such sale of the property taken in exchange that may be substituted, after the usufruct of the parents von Opel has been safeguarded, I cannot separate that from the usufruct.

Therefore, all that I can say at this moment is that this provision, as this contract is written, does not establish a conditional transfer of title; it doesn't affect the transfer of title. The way it is written, it permits only other
392 explanation, and I think I can present explanation, as you say.

Q. All right, Doctor. Now, before we return to the explanation of the first paragraph on page 2, there is one question I would like to ask you about the transfer of title to the 600 Opel shares.

When we discussed page 1 on Friday, you testified that under German law a substitution of an assignment of claim against a third person in possession would permit the actual transfer of title, did you not? A. Yes, I did.

Q. At that time, I do not believe that I gave you the assumption of a fact that if these shares were physically located in New York, would that make any difference, under German law? A. It depends why they were situated in New York. If they were situated in New York on the basis of a contract between the Opel parents, or Wilhelm von Opel, with a New York bank, then certainly we would have to consider under which law this assignment, by Wilhelm von Opel to Fritz von Opel, takes place.

Q. Well, assume, Doctor, for our purposes, that the shares of stock are located in a bank in New York, and that the parents fail title in respect of this through a claim against the bank.

393 As I understand your testimony, you stated that under German law, an assignment against a person in possession, a third person in possession, may be substituted for the shares themselves, and title will pass. A. Yes.

Q. And the only question I am asking you is whether it makes any difference whether those shares are in New York or in Germany, under German law. A. It makes a difference, under German law, whether the shares deposited in New York were deposited under a contract governed by New York law. Suppose a contract between the bank, the National City Bank or the Guaranty Trust Bank, in New York, and the Opel parents, was governed by New York law, then the assignment would have to be valid under New York law, because the German conflict of law would look to New York law for the problem whether this assignment is good.

But if the assignment is good, then the title in the shares would pass with the transfer.

Q. Assuming that the assignment of the shares was valid, then, as I understand you, under the German law, the title would pass? A. Exactly.

Q. Directing your attention now, Doctor, to this first paragraph on page 2, you have testified generally on Friday that this is to be reserved rights on behalf of

394 the donors. Would you explain in more particularity as to what you had in mind in interpreting this contract as to just what rights are reserved to the donors? A. You have to permit me—I began yesterday to say a few words about the interpretation of German contracts and the rules of interpretation.

Q. What are those rules? A. Because if you take this language in itself, it looks like a pretty sloppy way of drafting; and we have to interpret it under the following test:

First, the objective statement; what does he state?

Second, we have to put it together with the other sections in the contract.

And then we have to look at the intention of the parties.

I told you before that under German law, one possibility is excluded, that this section interferes with the transfer of title.

Another possibility is excluded, that this section established a right in rem of the Opel parents.

Q. Doctor, what do you mean by a right in rem?

Mr. Burling: I object to the question, if Your Honor please. I know Your Honor is operating under the equity rules, and it tends to let everything in. I wish to save an objection for the record at this point, however, that this plaintiff is estopped, fundamentally estopped, to assert there was no usufruct, because this plaintiff has asserted in the United States District Court for the Southern District of New York, under oath of Wronker-Flatow and Fritz von Opel, that the usufruct was validly created and Fritz von Opel in 1935 had acquired legal title. I wish to save the point of estoppel for the record.

395

The Court: All right.

Mr. Boland: Your Honor, we most forcefully disagree with the position of the defendants on that; but we will take the issue up when they establish their point, if they do.

By Mr. Boland:

Q. Would you explain what is meant by a right in rem under the German law, Doctor? A. A right in rem is the opposite to a right in personam. If we take the Civil Code

again and look in the second and third parts, the second part speaking of the relationship between persons, such as a sales contract, a buyer and a seller make a contract of sale; this contract does not establish any right in rem, legal or equitable, none at all. It established a claim of the buyer against the seller to enter into with him a conveyance contract.

Q. For the conveyance contract, you have to look into the third part of the book. The third part of the book established all the rights in rem which exist. And there the
—— German law is very definite; there are only a
396 limited number of rights in rem in existence. It is absolutely clarified how they are established. No interpretation is possible, by mere judicial or legal or any other interpretation, to bring any of these rights in existence.

The general right is property right. I own the chair. But I have a right in rem in this chair.

I have a mortgage on real property. I can take out of the real property, by the means of foreclosure, the money I need. That is the relationship between money in the property.

It must be contrasted with the right in personam. I give a loan to X, and I have a claim against him to pay back. This might be evidenced by a mortgage, when I have a claim against X; and when he doesn't pay, I can exercise my right in rem to take the money out of the property.

So this distinction between right in personam, a claim against someone, for an action, the payment of money or any action, because the German law, as mentioned before, has specific performance as a rule; that is one thing. And an entirely different thing is the right of a person in something, a property right, a mortgage right, a pledge right, and so forth.

Q. Doctor, you say it is clear that this does not establish

a right in rem? A. Yes.

397 Q. If it doesn't establish a right in rem, how do you interpret this language? A. Since it dosn't establish a right in rem, it can only establish a personal claim, a personal claim of the Opel parents against the son, for certain action.

Now, if you will permit me to look again in the chapter on gift contracts, the chapter provides—

Q. This is a chapter of the German Code? A. Of the German Civil Code—it provides, in Chapter 525, that you might make a gift under an impost; and if you do so, the donor acquires personal claim against the donee for the performance of the charge.

Q. But a charge, under German law, does not in any way affect the passage of title? A. A charge or impost, under German law, neither interferes with the transfer of title nor establishes it in any way as a right in rem.

Q. Are you using the words "charge" and "impost" interchangeably, Doctor? A. Yes.

Q. So that your interpretation of the first paragraph on page 2 is that it creates a personal claim, an in personam claim on behalf of the donors against the donee? A. It is a charge—and I might, if you will permit me, refer to a court decision. It is a decision of the highest tax

398 court in Germany, the Reichsfinanzhof, a decision of April 7, 1925, in Volume 16, page 97. There a gift contract is made, and a Niessbrauch—I don't like very much the word "usufruct", because it is not a translation—a Niessbrauch is provided for in the contract.

The court says this Niessbrauch cannot come into existence without an act of reconveyance by the donee to the donor. And then it says that what it actually is—and I will translate it in a minute—

"Unter diesen Umstaenden kann aber die vorbehaltene Bestellung des Niessbrauchs nichts anderes darstellen alseine Auflage im Sinne des Sec. 525, BGB."

"Under this condition, the reserve establishment of the Niessbrauch can mean nothing else but a charge in the meaning of Section 525, B.G.B."

I follow exactly this approach of the court.

Q. Well, Doctor, if you state that the interpretation of this paragraph, the first paragraph on page 2, is merely an in personam claim, a claim of donors against donee, my question to you is what kind of rights are reserved? What are the particularities of the rights that are reserved to the donors, in respect of the language of this passage?

399 Mr. Burling: I object to the question unless counsel states to the witness that he is asking on the assumption of fact which the witness of course knows nothing about, that there was here no reconversion, no delivery back to the donor.

Mr. Boland: Reconveyance?

Mr. Burling: Yes, reconveyance.

Mr. Boland: I will be glad to make that assumption, Your Honor, that there was in fact no reconveyance into joint possession of the donor and donee.

Mr. Burling: And then I object on the estoppel point, on which Fritz von Opel swore to the Southern District Court of New York—

Mr. Boland: Your Honor, he has already made that objection.

The Court: Yes. I will hear you on that later.

By Mr. Boland:

Q. On the assumption, Doctor, there has not been an actual reconveyance into joint possession, and considering that as an assumption herein, would you describe in particularity the types or rights that are reserved, these so-called in personam rights reserved to the donor, in such language as we have in the first paragraph on page 2? A. I see three possible ways of interpretation. The one is that

this agreement gives the Opel parents a contractual claim for payment of a certain percentage of the income
400 which Mr. Fritz von Opel made out of this property.

Q. Would you explain, using the language of that paragraph, exactly how that claim would work? A. If I take this paragraph in itself, without looking to the paragraph 5; if I take this paragraph in itself, then the interpretation would be that the Opel parents have a right to tell the son, "We give you this gift, and you give us your income out of this property which we have given to you"—as a matter of personal claim.

And the word "usufruct" in German practice is not at all used in the way it is used in the third part of the B.G.B. as the right in rem.

It is very often in the literature used—let me give the German word—Zur Sicherstellung Niessbrauch, meaning a Niessbrauch for merely consentual relations—that the father in this case, or the parents, would be entitled to write a letter to the son, "Now the year is over, and you give us what you made out of this money"—that is, if I interpret this section in itself, without looking on anything else.

Q. So that in interpreting this section, the first paragraph on page 2, in and of itself, it would come down to the question what was intended was a personal right on behalf of the donors to claim 80 per cent, in effect, of the income
401 from the corpus of the gift? A. The first section doesn't speak at all of the 80 per cent. It just speaks of "The usufruct in the shares is not assigned to Fritz von Opel." I only speak of that—the 80 per cent, yes, it would be, since 20 per cent would go to Fritz von Opel. So that it would be a claim for 80 per cent. That is one possible interpretation.

Q. Now, looking at the gift as a whole, Doctor, and taking into consideration the language of the other paragraphs, following this paragraph, what other possible interpretations are available? A. We have here, in the fifth—

"In the event that the parents Opel shall not have drawn in full or in part the income from the shares accruing to them by virtue of their usufruct, the advancement to Fritz von Opel shall be deemed to have increased by the income not drawn and he shall be accountable therefor."

If somebody helps us to this extent, that if my first interpretation is correct, and that the parties establish a personal claim for the payment of the 80 per cent, then it would mean, taking these two sections together, that Fritz von Opel would not be obliged to make payments to the parents, unless specific demand is made by the parents for payment.

If the parents do not make any specific demand,
402 then Fritz has no obligation, and the money is to be added to the capital.

So that, using this language, your interpretation—the additional language of the give-agreement—how does that change the first possibility which you gave, Doctor, of an in personam claim? A. It doesn't change it. It only clarifies it to this extent, that Fritz von Opel would be under no obligation to give an income out of this gift, to his parents. He would be only obliged to do so if a demand is made. Otherwise the word "drawn"—"shall not have drawn in full or in part"—would not be sufficiently explained.

Q. Directing your attention, Doctor, to the remaining language on page 2 and the top of page 3, are you given any further clews as to a possible interpretation as to what the donors, the parties to this gift agreement, meant, in using the language in the first paragraph in page 2? A. Certainly, what I mentioned before, I don't find in this language any act of reconveyance giving the Opel parents any possession. Therefore I exclude any possibility of a right in rem.

Q. I understand that, Doctor, but thus far in looking to the affirmative side of your testimony as to what you do interpret the parties might have meant, you testified they

might have meant a personal claim against the donee
403 for 80 per cent of the income.

Are there any other interpretations of this language, using your objective test as required under German law? A. Yes, there are. It might be interpreted in this way:

Since the word "Niessbrauch" is used as a technical word in the third part of the Code, it might be that the Opel parents were given a personal claim against the son to establish a right in rem at any time they desire to do so. That is a possible interpretation.

So, then, if that is the case, the Opel parents would have no claim against Fritz von Opel for payment of anything.

But they would be entitled, at any time, to tell Fritz von Opel, "We wish that now a right in rem is established."

That means that the properties given in joint possession of the Opel parents and Fritz von Opel, and then the Opel parents take out of the money whatever they wish, up to 80 per cent.

As long as this claim for the establishment of this right in rem is not made, the Opel parents would have no right to get the money. But they would be entitled, at any time, at any minute, to say, "Now we wish the establishment of the right in rem."

Q. So that up to this point, Doctor, we have two possible interpretations, as I understand your testimony. One
404 is that the parents reserve to themselves merely a personal right against the donee, to call upon the donee for 80 per cent of the income from the corpus of the gift, purely as an in personam claim between two parties.

And the second possibility is that the parties might well have intended to have a personal claim on behalf of the donors against the donee, to call upon the donee at some future time to establish a right in rem, to call upon him to reconvey the property into the joint possession of the donee and donors, at which time the donors would then have

a property right in the property, the corpus of the gift, in order to enable them to directly draw the income from the gift itself.

Is that true? A. Yes.

Q. Are there any other possible interpretations? A. Yes; I see a third possibility, that these two first possibilities are to be combined; that the parents had a claim for 80 per cent, if they wished to have 80 per cent, or for 20 per cent, or for nothing, whatever they decide to have, against Fritz von Opel; and that in addition to that, they could, for purposes of security, say:

"Dear Son: Now we wish to have security for our claim, and this security is that you will now establish a right in rem.";

405 So that is a combination between these two possibilities. I believe that all three possibilities, on this language, merely the objective test, the three possibilities exist.

Q. So that bringing the three possibilities into partial focus, the first is the personal claim of the donors against the donee to call upon the donee for 80 per cent of the income. That is right, isn't it? A. Yes.

Q. And the second is a personal claim of the donors against the donee to call upon him to establish a right in rem? A. Yes.

Q. To establish the usufruct? A. Yes.

Q. And the third, being a combination of the first and the second, in other words, a personal claim on behalf of the mother and father von Opel, against the son, to call upon him for 80 per cent of the income? A. Yes.

Q. And they would have the additional right, which is a personal claim too, to call upon him at any time in the future to secure the first right, the 80 per cent of the income? A. Yes.

Q. They could call upon him to set up a usufruct
406 in order to secure that personal claim? A. Yes.

Q. At which time they would then have a direct property right in order to take the income themselves? A. They would have a combined right; they would have a right in personam, protected by and secured by a right in rem, as you have in a mortgage—exactly the same thing.

Q. And you say that the possibility of the parties intending to establish an immediate right in rem, that the parties intended at the time of the gift agreement to establish a right in rem, is not within the realm of interpretation? Is that the way I gather your testimony? A. I cannot testify as to intention. I can only testify as to what this piece of paper says.

Q. That is right, using the objective test on this piece of paper, and you say that that possibility is not within the realm of interpretation? Is that right? A. As this piece of paper it written, there is absolutely no possibility to interpret this piece of paper as the establishment of a right in rem.

Q. Why are you so sure in that statement, Doctor? A. You can interpret in German law very much in contractual relations. But you never can interpret conveyance, an act of conveyance, into a contract, especially in a case in which no possession, none whatsoever, was retained by the
407 donors.

Let me again refer to this, I would say, in the German law, that is absolutely elementary, that there cannot be a right in rem without possession or without an act of conveyance.

Now, again, in this case the Court says, where the gift was made, as I said, and a Niessbrauch was reserved, it says—and there is some real property involved—

"The gift of real property, under the reservation of Niessbrauch, can only be executed by, first, transferring the title to the donee, and then letting the donee establish the reserve Niessbrauch on behalf of the donor."

Q. In coming to the definite conclusion, using the gift agreement itself, that no immediate right in rem was established, have you used as a basis or at least as a partial basis for your conclusion the lack of any condition of reconveyance in the gift, Doctor? A. Certainly. It says no word of reconveyance. There is no word providing for joint possession. It is just saying that it is an assignment of the claim of the Opel parents to Fritz von Opel.

By this act, title passed; and, without anything more, no Niessbrauch or right in rem at any time can come into existence. All that can come into existence is, under
408 Section 525 of the Code, personal claims of different kinds.

Q. Assuming, Doctor, that a German attorney was present at the time of this gift agreement, and assuming that German attorneys prepared drafts and prepared this gift agreement, would that aid you in your conclusion that an immediate right in rem was not intended? A. Certainly. I think it is unbelievable to me that a German attorney doesn't know that. It might happen often that people who are really great business lawyers, forget about the basic rules on property law. But that is a basic rule of property law we are dealing with here, and if a German lawyer was present, there is no doubt that this contract expresses intentions which means no right in rem for the Opel parents.

Q. Doctor, you have practiced in Germany for quite some time; would you explain to the Court what language could be inserted in this gift agreement in order to establish an immediate right in rem. A. All that would have to be done is to add one part, in which you say:

"I, Fritz von Opel, herewith reassign—or assign—my claim against the depository of shares in New York to the Opel parents, with the understanding that it shall be a joint claim of the Opel parents and myself."

409 And by this act Fritz von Opel would have to take out the shares under the name of the three; it would

have been provided that he had to take these shares and put them in New York into a bank under the name of Fritz von Opel, Wilhelm von Opel, and Marta von Opel; or he could give it to the bank to keep it there, with instructions to keep it under the name of the three, and pay out exactly as it provided here. That is all that is necessary.

Q. So that if the parties had intended the establishment of the immediate right in rem, it would have been a very simple thing, under German law? A. Very simple.

Q. And it could have been done under this instrument itself? A. It could have been done, if the assignment was not made just as an outright assignment, but with the idea that it is reassigned to all three, it was already clearly an established right in rem.

Q. And, and the important thing in establishing an immediate right in rem is the joint possession, Doctor? A. The German law—let me say that—in regard to personal property, and in some extent in regard to real property, is based on the idea that there cannot be a right in rem without possession. Even if you had even a limited right in rem, you have to have possession yourself, or you
410 have to give the possession to a depository, or where you otherwise have the right to dispose of it, to give it to the other fellow.

But without possession and without any direct right to take possession, there is no right in rem possible, by very definition.

Q. All right, Doctor; I believe we understand your testimony, and particularly the three possibilities, the three possible interpretations which you have given.

You have indicated before in your testimony that you would explain the meaning of the fifth paragraph on page 2 after you had had an opportunity of explaining the first paragraph. Would you now explain, in the light of your testimony, how you interpret the fifth paragraph on page 2? A. Yes. If you take my first possibility in regards

to the first paragraph on page 2, you have to interpret the Section 5 this way:

First, that the Opel parents can make a claim against the son; but without making a demand, no obligation on the side of the son can exist.

If my second possibility of interpretation prevails, then the Opel parents were free to take out of the property up to 80 per cent, but they were not bound to do so.

Q. That is, after demand was made and the
411 usufruct established? A. Yes.

And on the first possibility, where the right in rem is only established to secure the claim, certainly the same theory followed that I have in the first possibility, if the Opel parents demand, and the son doesn't pay, then the Opel parents might make him pay it out of the right in rem. If they don't claim, the money is added to the capital.

And in the case of death of the Opel parents, and in case of distribution of the estate, the whole gift, plus the money not called on by the parents, is to be accounted for in the distribution of the estate, as discussed on Friday.

Q. Under your interpretation of this paragraph, Doctor, until a demand is made, under the first possibility, there is no establishment of a right in rem; it is merely a personal claim? A. Yes.

Q. For 80 per cent of the income? A. Yes.

Q. Until a claim is made, for 80 per cent of the income, is the donee free to do with the corpus and the income as he will? A. He has full power to do with the property what he wants, because it is his property. His obligations in regard to the property are purely personal obligations to the Opel parents.

412 Q. In the second possibility, which is merely the personal right to call upon the donee to establish the right in rem, upon demand of the donor, until such demand is made, would you explain the ownership rights of the donee, Fritz von Opel? A. Until such demands are made, Fritz von Opel is the free owner.

Q. So you would interpret— A. And even if there are claims in regard to number one, then there is a personal claim; and as long as no judgment is taken, there is no right in rem in existence.

Q. I understand that, Doctor. But I am now on the second possibility, where the only right is that the donor has reserved to himself the right to call upon the donee to establish a right in rem in favor of the donors. A. Yes.

Q. Until demand is made, is the donee free to do with the property as he will, both corpus and income? A. Yes.

Q. And, under this possibility, your interpretation of the fifth paragraph on page 2 is that until demand is made, the uncalled for portion of the 80 per cent income will be added to the capital only after demand is made? Is that right? A. It will be added to the capital if no demand is made?

413 After demand has been made to establish the usufruct. A. Ah, yes.

Q. And until demand is made to establish the usufruct, this paragraph does not apply to the gift? Is that right? A. I have to ask you to repeat the question. I am not clear about that.

Q. Under the second possibility, as I understand your testimony, the donors, the parents von Opel, reserved unto themselves the right to call upon Fritz, the donee, to set up a usufruct, at which time they would have a right in rem for 80 per cent of the income. Is that right? A. The right in rem for 80 per cent of the income, that is not entirely clearly expressed, because a right in rem means if once the right in rem is established, the income goes to the parents.

Therefore, if the right in rem is established, it is up to the parents to take out of the income coming to them as much as they want. And this here provides that if they don't take, if they don't exercise their power, then it is to be added to the capital.

Q. That is exactly my point. Suppose no demand is made by the parents against Fritz to set up a usufruct, then the

provisions of this paragraph would not apply, until
414 the demand is made? Is that right? A. Until—we are working with the second possibility—

Q. That is right. A. Certainly this has no meaning until the Opel parents put themselves in the position in which they can get any of the profits. And they can get any of the profits, as the second possibility, only if the right in rem is established.

Q. So that until the demand is made, the right under the second possibility does not apply? A. Exactly.

Q. Would you go to the further paragraph, please, Doctor? A. (Reading): "If the shares should be sold or exchanged against other property the proceeds from such sale or the property taken in exchange shall be substituted for the shares, after the usufruct of the parents Opel has been safeguarded. All provisions stipulated above will then fully apply to such substituted property."

Q. What does this paragraph mean? A. Could I see the German text?

Q. I have it (handing to witness). A. It is exhibit—

Q. 5—5-A. A. Yes. What is your question?

415 Q. What does this paragraph mean? A. This paragraph means, in regard to the second possibility, that the Opel parents can claim the establishment of a right in rem not only in the original Opel shares; but if Fritz von Opel has sold the shares and has other property now, out of these shares, that this right in rem is to be established in this new property of Fritz von Opel.

So it indicates that the parties had in mind that Fritz was free to dispose of the property. Furthermore, there is one word in the German especially—

Mr. Burling: I object to it, if the Court please. It has been stipulated—and it is hard enough to deal with this very intricate matter of foreign law in the one language—and it has been stipulated by counsel for both sides that the translations of all these documents are correct.

The Witness: Let me say a word to that. Between correct translations and translations for all purposes, in the technical meaning we use by a lawyer, it is difficult; there are words which have just a flavor, under the law, which you cannot translate.

I don't object against the word "safeguarded" at all. But I have to work out the word "Sicherheit". I have to refer to this word.

Mr. Burling: May I be heard further, Your Honor?

416 This witness is not coming newly to this case. He went to Germany, for example, to assist in the deposition of Wilhelm von Opel and others, which were read. And long before the stipulation was entered into that this document was correct, Dr. Kronstein was fully familiar with the document and hundreds of pages of testimony were taken concerning it.

The Court (to the witness): I understand you to say there are some English words which do not indicate the full import of the German words, notwithstanding the translation. I think you would have a right to take that into account.

The Witness: The word "Sicherstellung", this word, which has a very specific meaning in German law—or "Sicherheit" is used in connection with my first possibility. You use this word if you are perfectly clear about the fact that no right in rem exists. But that whenever you wish to acquire protection, security, and, for instance, a mortgage is exactly that—"Sicherstellung".

Therefore I wish to refer to this word which was used, which was a certain indication of the test, of this objective test, what that all means; that it means a possibility that the parents as against the son, and if the son didn't say, or if the parents wished to have other protection, they could ask for a right in rem, if they wanted it.

By Mr. Boland:

Q. Would you direct your attention, Doctor, now to
417 the first paragraph on page 3. I believe you indicated you were going to withhold your explanation of that until after you have covered the usufruct paragraph? A. Yes.

Q. Would you explain what that means, in the light of your previous testimony?

The Court: Excuse me just a minute, before you go to that.

In regard to this paragraph, the fifth on page 2, do I understand you say, under the German law, if the parents of Fritz von Opel had wished to assert this right in rem against the exchanged property, that this property he bought out of the proceeds of the sale of the other, they might have done so at any time?

The Witness: At any time.

The Court: They might do so even now? His mother might do so even now?

The Witness: Suppose nothing happens, I don't know what happens between this document and today. But if nothing happens between this document and today, then this right exists.

The Court: Well, now, is that a legal right?

The Witness: A personam is not in the property.

The Court: I understand. It is a legal right that would be asserted in the courts.

418 The Witness: Yes.

The Court: Upon a demand.

The Witness: Yes.

The Court: I see. Go on.

Mr. Boland: Your Honor, in order to clear up any problem you might have in your mind at this time, we intend to establish as a fact that any rights reserved to the donors under this gift agreement were in fact waived, and we intend to establish that the waiver was valid.

The Court: All right.

By Mr. Boland:

Q. You were reading, I believe, from the first paragraph on page 3. A. Yes—

"If Fritz von Opel predeceases his parents without leaving legitimate issue, the gift executed by this document will become void. The stocks or the property substituted therefor including the income accrued but not drawn will then revert to the parents Opel or the surviving parent."

Q. Would you explain that in the light of your testimony, Doctor? A. That if the right in rem is established, if the parents demand the establishment of the right in rem, under my second possibility, then there is definitely established a claim in specific property in which the interest exists. We could then say that in case of the death of Fritz von Opel without legitimate issue, this specific property would go to the parents.

419

As long as their right in rem is not established, we have some difficulties to interpret this provision. And it might even have no meaning, until the right in rem is established. But it certainly has not more meaning than that, that in the case of the death of Fritz without legitimate issue, the Opel parents have a claim against the estate, under the German law, against the heirs, for what remains out of the gift, if any.

Q. There are two conditions, are there not, situated in that paragraph? A. First that Fritz von Opel predeceases, and second that he predeceases without legitimate issue.

Q. And if upon the happening of those two conditions—first, that he predeceases his parents, and secondly that he predeceases without legitimate issue—what type of right would the donors have in such a case? Is that merely a personal right? A. Yes.

Q. And that would be a right against the estate of Fritz

von Opel, for what is remaining in the corpus of the
420 gift? A. Yes.

Q. During the course of the opening statement, Doctor, Mr. Burling alluded to the analogy of a trust, using the cestui que trust analysis. You are familiar with trust law in this country, are you not, Doctor? A. Yes.

Q. Would you distinguish a Niessbrauch from a trust? A. As I have already said, I learned to be extremely careful in using concepts of one law in the other law. But as a legal device, Niessbrauch and trust have absolutely nothing to do with each other. They even exclude each other. Let us cite an example:

In cases of trust, the legal owner has no right, no beneficiary right, in this matter. If the beneficiary has a right, and the legal owner is only to the outside of the owner.

And the Niessbrauch, the definite and final right, economic and beneficial right, is with the title owner, only for a certain period of time, for instance, for a lifetime, of the Opel parents. But after this time is over, usually lifetime, then the title owner has no limitation any more.

For instance, if I am a creditor of the title owner, I can certainly in execution of judgment take his title, and his title is only limited in full use by this right in rem of the
parents or of the Niessbrauch, to take out certain
421 parts of the income or all of the income, or whatever it might be.

Q. So that, as I gather your testimony, the analogy between trust and the Niessbrauch is not a true analogy? A. No. It is once in a while used for certain purposes. A lawyer highly regarded by me wrote an article in the Columbia Law Journal where he works out all possible cases in which you might use institutions of German law in many different situations, to accomplish what American law accomplishes by trust. There he mentioned one particular situation in which you might use the Niessbrauch for the same purpose. But that is all. You cannot, beyond that, compare the two institutions.

Q. So that the net result of your testimony thus far, having covered the gift agreement in detail, is that it is a promise to give, and an acceptance by the donee; that title passed through words of conveyance, which cure the lack of notarization; that title actually passed to 600 Opel shares in New York, on the assumption that the words of assignment were valid under New York law; and that the remaining words of the gift agreement, on pages 2 and 3, did not affect in any way the passage of title.

I believe you further testified that the first paragraph on page 2 created an in personam right on behalf of the donors against the donee. There were three possible inter-
422 pretations;

One, merely the personal claim against Fritz; and

Two, merely a personal claim to call upon Fritz to set up a usufruct or Niessbrauch; and

Three, a combination of the first two, a personal right against Fritz, with a further personal right to call upon him to establish the usufruct to secure or guarantee, in effect, the personal claim.

And that the language in connection with the first paragraph on page 3 was merely an in personam right or a personal claim on the surviving mother on behalf of the donors, if the son predeceased without legitimate issue; and that that personal right ran only against the remaining portion of the corpus of the gift at the time of his death.

So that we have only two personal rights against Fritz von Opel. And how would you describe paragraphs 2, 3, and 4, Doctor? Are they also personal rights? A. They are not on the same level with the other rights. The other rights follow Section 525, as charge or impost. This paragraph you refer me to just now I already described on Friday as rules made by the donors for the case of the distribution of the estate of the Opel parents.

Q. So that they are merely testamentary in nature and concerns the testamentary disposition and the arithmetic of such disposition on behalf of the donors? A. Don't call it

"testamentary" in nature, because you come then
423 into the problem of form. Under the express provision of 2050 B.G.B., it is provided that whatever the donor requests in the gift, the accounting has to take place.

Q. Would you direct your attention now, Doctor, to Plaintiff's Exhibit 7. This purports to be a draft of a gift agreement, and I would like to ask you whether or not you are familiar with this draft, Doctor? A. Yes, I studied that in preparation of this testimony.

Mr. Boland: I believe this agreement, Your Honor, has been stipulated by defendants to have been prepared by Dr. Max Hachenburg, and that this is a copy of the draft prepared by him.

Mr. Burling: We have stipulated a draft. I believe you have the number wrong. We do stipulate Plaintiff's Exhibit 8 is a draft prepared by Dr. Max Hachenburg.

Mr. Boland: Yes; thank you very much, Mr. Burling. It is Exhibit 8, Your Honor.

By Mr. Boland:

Q. Dr. Kronstein, are you familiar with the name Dr. Max Hachenburg? A. Certainly.

Q. Will you explain generally who he is? A. Hachenburg
424 was one of the two commentators of the Commercial Code.

Q. The Commercial Code? A. The Commercial Code. And of a number of other statutes. He has, and I am glad he—he is alive—he has the highest possible reputation of a practicing attorney, comparable in this country with John W. Davis or someone similar.

Q. By "commentator", Doctor, I believe you had better explain that a little. We in America might think of radio commentator. Is that in connection with preparing his commentaries? A. Yes. As I mentioned, the code system operates this way, that you go through the Code, to the decisions, and the commentaries.

Hachenburg wrote one of the two National Code commentaries. You would not decide a question, as a Judge or a lawyer, in commercial law, without consulting Hachenburg. You have not to accept it, because there is in some cases a difference of opinion. But no Judge or no practicing attorney will overlook what Hachenburg has to say.

Q. Directing your attention, now, to Plaintiff's Exhibit 8, Doctor, you have testified you have read this particular exhibit. Assuming, now, that this exhibit had been in the hands of the parties to this gift agreement and was used as a basis of the gift agreement, does this draft shed any light upon your interpretation of Exhibit 5? A. Cer-
425 tainly, it does.

Q. Would you explain what light is shed, and how? A. In Section 1—

Q. Would you read the portions to which you are referring aloud, Doctor? A. Yes. In Section 1 it makes what I call the promise and the acceptance, as well as the transfer of title—

"Geheimrat Dr. Wilhelm von Opel and his wife ne ..... residing in Wiesbaden, make a gift, from their community property, to their son Fritz von Opel, residing in Antwerp, of par value RM 6,000,000.00 shares of stock of the Adam Opel Aktiengesellschaft in Ruesselsheim. These shares are No. .....

"The donee accepts this gift gratefully.

"The parents execute this gift by transferring the title to the donated shares. The shares are, at the present time, deposited with General Motors in New York. The title is transferred by assigning the donor's claim to have the shares delivered to them. This claim is assigned herewith. General Motors will be advised of the assignment of this claim by the parties concerned.

"The following further provisions apply to the gift:

"Section 2."

426 Q. Before you get to Section 2, Doctor, generally that mere indicates there was a promise and an acceptance, and the actual assignment of the title? A. The

title is transferred by assignment, by assigning the claim of the donors to have the shares delivered to them.

Q. What I am particularly interested in, Doctor, is whether this draft sheds any light on the first paragraph on page 2. A. Let me see Section 2. You have to interpret Hachenburg's draft in Section 2, in connection with Section 1. In Section 1 he established the promise of conveyance, as well as conveyance. In Section 2 he goes on to establish whatever else—

"The donors reserve to themselves for life the usufruct in three quarters i.e., in par value RM 4,500,000.00 of the donated shares. The balance of RM 1,500,000.00 is exempt from the usufruct. The donors' usufruct expires at the death of the last parents.

"Mr. Fritz von Opel is entitled and, upon demand of the donors obliged, to assign the shares to a holding company which he owns. In this case the parents will have the usufruct in 75 per cent of the shares which the holding company will be required to issue in exchange for the Opel
427 shares. These shall be deposited in the name of the father, Geheimrat Dr. Wilhelm von Opel. After his death these shares shall be considered as deposited for the wife of Geheimrat Wilhelm von Opel, Geheimrat Dr. Wilhelm von Opel and, in case he should predecease his wife, his widow"—and so on.

Q. Does the language you have just read in Section 2 of the draft, Exhibit 8, does that language shed any light on the intention of the parties? A. Yes.

Q. How does it, Doctor, and what light does it shed? A. It says, in paragraph 1, that the donors reserve their Niessbrauch, without establishing the right in rem.

But it says, in Section 2, paragraph 2, that on demand of the Opel parents, Fritz von Opel shall be obliged to assign the shares to a holding company, and that then these holding company shares shall be deposited in the name of the father.

Q. Does that fit into any one of your three possibilities to which you have previously testified, Doctor? A. Absolutely. It is exactly my third possibility.

Under Hachenburg, what he had in mind—and of course I don't know what he had in mind—and knowing Hachenburg and having seen him drafting many, many contracts,

I know that such a contract is not written, just written
428 down, but is studied extremely carefully, and that every word has very much a meaning.

He says, in Section 2, that on demand of the donors, Fritz shall assign the shares to a holding company, and in this case the parents shall have this right, and they shall be deposited in the name of the father.

So he had perfectly in mind that the right in rem shall come in existence at the moment these holding company shares are deposited with the bank, and they shall be dependent upon the demand of the Opel parents, if they demand that; but Fritz, however, might do it without demand.

Q. But you have indicated, by using the Hachenburg draft, you come to the conclusion quite clearly that what the parents intended was that a right in rem upon the demand of the parents to the son be created through the assignment of the holding company shares into the possession of the donors? A. That is the objective test of this draft of Hachenburg's, beyond what the gift agreement you have shown to me shows.

Q. Is there any further indication, by the use of the Hachenburg draft, Exhibit 8? A. Could I see the German again please?

In the draft itself, or in what you call my attention first to Plaintiff's Exhibit 7?

429 Q. I am talking about what is now marked as Plaintiff's Exhibit 8, which is the draft of October 3, 1931, I believe. A. Yes. I call your attention to two points, first on page 2 of the English translation.

Q. Of the Exhibit 8? A. Of the Exhibit 8, in paragraph 3.

Q. The third paragraph on page 3? - A. Yes. In paragraph 3 he again provides that in case that the holding company is established, and the right in rem is established—there are two conditions—then the father guarantees that the son gets a special minimum amount of money.

In Section 3 it says, in paragraph 3,—

"If the holding company has not distributed all or part of its profits, so that the usufructuaries did not draw the proceeds during their lifetime, these reserves together with the holding shares themselves will remain in the hands of the son Fritz von Opel to whom the gift was made."

These two provisions are both dependent upon the establishment of the holding company and of the right in rem. As long as the holding company was not established and the shares were not put into possession and did not remain in possession, there was a complete, free property of Fritz von Opel, and only a personal claim against Fritz, out
430 of Section 2, paragraph 1.

Mr. Burling: I move to strike the answer, Your Honor. The witness said, "As long as the holding company was not adopted." If he has any knowledge at all, he knows it was, and that Uebersee, the plaintiff here, is that corporation.

The Witness: Pardon me. I used the words "If it should not be established", because I only follow the words the draft speaks of.

Mr. Boland: Your Honor, this is a draft of October 3, 1931, as Mr. Burling well knows; and we are endeavoring to get the intent of the parties on October 3, 1931. At that time there was no holding company established and there was no such thing as Uebersee, owned by the plaintiff or by Fritz von Opel here.

And the question to Dr. Kronstein was whether or not this draft gives any light on the intent of the parties, and he is merely describing the draft in view of what the parties could have intended.

Mr. Burling: The witness said that as long as this was not done, then there was no right in rem. But that is a condition contrary to facts, since it was done.

The Court: You can bring that out on cross. And I will make a note as to what the facts are, and if it is not applicable, I will disregard it.

By Mr. Boland:

431 Q. Directing your attention, Doctor, to Plaintiff's Exhibit 9, which is entitled "Fundamental Considerations", the defendants have stipulated that this particular exhibit was prepared by Dr. Hachenburg, the same Dr. Hachenburg who prepared the draft which is Plaintiff's Exhibit 8.

Is this document a fair summary of the Plaintiff's Exhibit 8 which you were just reading from, Doctor? A. It is the preparation of that. It contains the principles on which Exhibit 8 obviously was based.

Q. Does this exhibit, Plaintiff's Exhibit 9, shed any light on the intention of the parties to this gift document, Doctor? A. Can I see the German, please?

Yes.

Q. And would you indicate the particular portion to which you are referring when you make that answer? A. I think very important is number 4.

Q. Number 4? A. Number 4 of this "Fundamental Considerations."

Q. On page 2? Yes; would you read that, please, Doctor? A. It says:

"In order to secure the usufruct, the donated shares or the holding shares replacing them are deposited with a bank in the father's name. By virtue of his usufruct, the
432 father is entitled to vote the shares in the case of such resolution of the holding company which dispose of the actual net profits. Father guarantees to his son that his 25 per cent share of these profits will amount to"—additional sums.

Q. And from that you draw what conclusion, Doctor? A. In order to secure the usufruct, or in the German language, "Zur Sicherstellung" Niessbrauch—and, if you speak of "Sicherheit", or safeguard Niessbrauch—it is absolutely impossible to have any other interpretation but my interpretation number three.

Again he speaks of the contract which is to be made right away, the transfer of the gift is to be made right away, under number 1 of this "Fundamental Considerations." And then it says, under number 3—

"The gift was made subject to a usufruct for life"—

And then it says—

"In order to secure the usufruct."

If the usufruct would have been established as a right in rem right away, there is nothing to secure, because nothing secures itself better than a right in rem itself.

Therefore, from this I say clearly that Hachenburg didn't want to establish a Niessbrauch right away. He wanted to have a personal claim, and then the question of the right in rem is a question of the demand of the parents, or of no demand of the parents, for purpose of securing.

433

Q. So that, Doctor, as I understand your testimony now, after having gone through the gift agreement itself, Exhibit 5, very searchingly, and having gone through the drafts of Hachenburg, that on the basis of these three documents, you have concluded there is no right in rem; that there was no an intent to establish a right in rem, an immediate right in rem. Is that right? A. Yes.

Q. That all drafts, and the document itself, are consistent with the promise of the donors to give and the acceptance by the donee; they are all consistent with the position you have taken, that title actually passed? A. Yes.

Q. Through the Exhibit 5, through the instrument itself, and also consistent with the position that merely personal, in personam claims are reserved to the donors, and that no right in rem was established?

Is your answer yes? A. Yes.

Q. And that no right in rem was intended to be immediately established? Is that right? A. Yes.

Mr. Boland: Your Honor, it is just about 12:30,
434 and I am going to take him into a slightly different phase of this.

The Court: All right. We will resume at 2 o'clock.

(Accordingly, at 12:25 p. m., the luncheon recess was taken until 2 o'clock.)

* * * * *

441 DR. HEINRICH KRONSTEIN resumed the witness stand pursuant to the luncheon recess, and testified further as follows:

442 *Direct Examination* (Resumed)

By Mr. Boland:

Q. Dr. Kronstein, directing your attention to Plaintiff's Exhibit 7, are you familiar with this document? A. Yes; I studied it in preparation of this testimony.

Mr. Boland: Your Honor, this particular exhibit, I believe, has been stipulated by defendants to be a letter from Dr. Hachenburg to Mr. Wilhelm von Opel in which the draft, which is Exhibit 8, was attached and enclosed.

By Mr. Boland:

Q. You are familiar with this document, Doctor? A. Yes, I am.

Q. Is there anything in this letter, Plaintiff's Exhibit No. 7, which would shed light on the intent of the parties? A. Yes.

Q. Would you point out the particular verbiage of the letter and read it aloud, please? A. One point is to be found in the last part.

Q. The last paragraph? A. Of the letter.

Q. Of the letter. A. Yes.

It says: "But the same would apply if the contract were to provide not for a true usufruct, but instead for a
443 purely personal claim to the payment of a corresponding share of the profits. This right also would be part of your property. It is to be evaluated in the same manner as the usufruct itself."

I mean, for purpose of taxation.

Q. From the language in there, he used it in interpreting the intent of the parties? A. It was evidently in the mind of Hachenburg that there should be a possibility. One is merely a contractual right, involving his contractual right, and combining security.

Q. Yes. Possibility one and three? A. Yes.

Q. It is merely a personal claim against the donee? A. Yes.

Q. Or in the alternative, a personal claim against the donee with the right to secure a personal claim by demand and establishment of usufruct? A. It says: usufruct itself. It is a very technical word. It is approximately correct but it doesn't bring out this flavoring. There is a German uneigen. The opposite of that is eigen. Eigen is his. So he has very well in mind that it is—

Q. (Interposing) Well, is there any language in that letter which sheds light upon the intent of the parties to you, Doctor?

444 The Court: He did not finish on that last paragraph.

By the Court:

Q. What right is he talking about? What does the right mean? Part of that property? A. He is talking about taxes.

Q. Do you have the right in personam? A. Yes, sir.

Q. That is a taxable right? A. Yes, sir.

Q. And that is what you call property? A. It is not a property right. It is a claim, and under the German tax law, under that parmeigen, and while you have difficulty of translation, it means all the assets, and is to include his claims, athough it is not property but it is a claim.

Q. You mean a right which he may or may not assert? A. It is against his son, which he may or may not assert.

Q. It would still, however, be returnable for tax purposes? A. It is still to be reported for tax purposes.

I conclude from that that it was clearly in the mind of the people who drafted and discussed the contract, what they did, that the establishment of a right in rem was not
445 the purpose of the agreement. It looks like, as I pointed out before, Hachenburg drafted it and he outlined it. My personal opinion is number three, a personal claim, which he might combine, if he wished, with the right in rem.

By Mr. Boland:

Q. That is demand upon the son to secure that claim with the right in rem by the establishment of usufruct upon the demand? A. Yes, sir.

Q. Is there any other language in that Exhibit 7 which sheds any light, Doctor? A. On page 2, at the end of the second paragraph on page 2:

"Such an arrangement would, at the same time, stress the fact that this is not a fictitious transaction. It is your actual intent that the ownership pass to your son immediately, only the income is reserved to you."

That makes it important for the interpretation of the document, that the first draft of the document had in mind to have the property right transferred, and only income is reserved to you, in the relation between father and son.

I believe that strengthens my opinion on the meaning of this contract.

Mr. Boland: Let me have Plaintiff's Exhibit No. 4.

By Mr. Boland:

446 Q. Doctor, I show you now a document which has been identified as Plaintiff's Exhibit 4 and entitled power of attorney, and ask whether or not you are familiar with this document? A. I studied it in preparation for my testimony; yes.

Q. You have heretofore testified, Doctor, that on the basis of the language of the gift agreement, Exhibit 5, that title passed absolutely to Fritz von Opel. You have testified that your contention in respect of the usufruct is that there is merely a personal claim on behalf of the donor against the donee, and you testified that the language on page 2 and 3 of the gift agreement did not in any way affect the passage of title, did you not? A. Yes, I did.

Q. You have had opportunity to re-read this power of attorney? A. Yes.

Q. You know that the power of attorney is dated October 6, 1931; isn't that true? A. Yes.

Q. If you were to know, Doctor, that Fritz von Opel—assume this: Assume we establish this as a fact: that Fritz von Opel actually came to the United States and went to the National City Bank and exercised the claim against the National City Bank through the use of this power
447 of attorney. Would that in any way affect your testimony in respect of the passage of title to Fritz von Opel under the gift agreement, Exhibit 5? A. No, it would not.

Q. Can you explain why not? A. If the title passed, a power of attorney cannot change the fact. The title passed, and this document as it stands does not shed any doubt that the title passed on October 5th. This document prepared is signed October 6th, so it cannot change the fact that title passed before.

Q. So if I understand your testimony correctly: If title passed on October 5th, then the granting of a power of attorney by the father to the son on October 6th, would in no wise interfere with the passage of title on October 5th? A. No; not at all.

Q. Even if Fritz von Opel were to exercise claim against the National City Bank through the use of a power of attorney? A. Yes, sir.

Mr. Boland: I would like to have marked for identification a letter dated September 22, 1933, addressed to Fritz von Opel by the National City Bank.

(The document referred to was marked Plaintiff's Exhibit No. 47 for identification.)

By Mr. Boland:

448 Q. Doctor, I show you now a document which has been identified as Exhibit No. 47 and ask you to read that document aloud. A. (Reading:) "Mr. Fritz von Opel, New York City.

"Dear Sir:

"We quote the following extract from the cable received from the Deutsche Bank & Disconto Gesellshaft, Frankfurt on October 24, 1931:

"'GEHEIMRAT DR. WILHELM VON OPEL RUESSELSHEIM INSTRUCTED US TO CABLE TO YOU THE FOLLOWING NEW POWER OF ATTORNEY—UNTIL YOU HEAR FROM ME TO THE CONTRARY YOU ARE HEREBY AUTHORIZED AND REQUESTED TO ACT UPON ANY AND ALL INSTRUCTIONS WHICH MAY BE GIVEN YOU FROM TIME TO TIME BY MY SON FRITZ VON OPEL REGARDING ANY

AND ALL FUNDS OR OTHER PROPERTY AT ANY TIME WITH YOU FOR MY ACCOUNT AND TO HONOR EACH AND EVERY WITHDRAWAL HE MAY REQUEST THEREFROM—SIGNED DR. WILHELM VON OPEL.'"

Q. Having had opportunity to read Plaintiff's Exhibit 47 for identification, and assuming that this telegram was in fact signed by Wilhelm von Opel, would that in any way change your testimony in respect to that passage of title? A. No, Mr. Boland. I told you before that this document on its face, dated October 5, 1931, transfers the title to Fritz von Opel. This title passed and no power of
449 attorney whenever given, can change the fact that title passed.

Q. That is assuming title passed on October 5th? A. Yes, sir.

Q. Doctor, you have practiced in Germany for quite some time. Is there anything unusual about having made a gift, where the title passed on one day, and the next day giving a power of attorney to act as the agent of the donor? A. In this banking transaction, you have shares that are deposited in the bank, and the father gives to the son the shares. He does not go to the bank to get the agreement, or statement to the bank, to get the agreement for consideration or examination, and the best way to handle it is to give a power of attorney, so that the bank can give the property out without any further examination. For instance, such occasions of gifts of shares is not the case of the usual business dealings, but if you have the situation, which you have every day, I come to the bank and ask for credit, and the bank tells me: All right, I give you credit, but you assign to me a hundred thousand dollars worth of stock and assign it as of this day, and we will not inform your customers, your debtors, of this assignment, and you give the bank a power of attorney, and we collect on that power of attorney.

This assignment to the bank would be perfectly all
450 right, and the power of attorney which in form looks inconsistent, is perfectly consistent, and if, for instance, a bankruptcy occurs of the assignor, the assignment is perfectly all right, and the power of attorney only given for the purpose of collecting to make things easier.

That is nothing special at all.

I could refer to Mr. von Tour, who in this part of the private law is a leading writer of leading textbooks, and he discussed this question carefully and does not find anything unusual in that.

Q. Getting back to my question, Doctor, I don't believe you have answered it directly.

Is there anything unusual about giving a gift, where the title passes on one day and subsequently to give a power of attorney? A. No. I just don't like your wording, if it is unusual in a gift. Gifts are always unusual because human beings do not make gifts but make contracts for consideration, but when it is usual and the title passes and a power of attorney was given later on, it is perfectly usual and absolutely consistent with the transfer of title.

Q. Let me ask you, Doctor: Assuming it was established in this case that the giving of the power of attorney was for the purpose of facilitating the exercise of the claim against the National City Bank, would you under
451 such circumstances consider it unusual for an attorney to recommend such a procedure? A. No, not at all.

Q. You have testified, Doctor, thus far that the title has passed, according to the agreement, on page 2, and had no effect on the passage of title, certainly any personam rights created, and it was clear that that was the intent of the party. You have also testified that the power of attorney given to the son in respect to the exercise of his right as donee was not unusual, and that they in and of

themselves in any wise changed the passage of title already having taken place. Now, Doctor, directing your attention to another phase of this problem, let us assume that those rights which you have testified about, that they have been created and reserved to the donor. Let us assume that the rights as actually intended by the parties were within the realm of these three possibilities. Under German law can such rights be terminated in any fashion? A. Some of them; certainly.

Q. What is the law of Germany with respect to the termination of right of this nature? A. In regard to my first and third possibility, an understanding or agreement between Fritz von Opel and the parents would be necessary and satisfactory. It is the idea of the law that contractual claims cannot take place one-sided. It has to take
452 place by understanding, and all that is necessary is an informal understanding and that the son's claims shall be waived and abandoned. That is all that is necessary.

Q. And you direct your testimony to possibility one? A. Yes; one and three, and I would say the same in regard to possibility number three. I find, I feel the one-sided assertion by Wilhelm and Marta von Opel would be sufficient because even if the right in rem is established under the specific provision of the law, it can be waived by the party entitled to the right in rem. If the Opel parents could waive the right in rem itself, they can waive the claims to establish the right in rem in the same way they could waive the right in rem itself, that is, by one-sided agreement.

Q. What about possibility two, where the donor has claim against his donee? A. I spoke of possibility two.

Q. You mentioned it as three. A. As possibility three?

Q. Yes. You just testified, as far as the record is concerned, of possibility three, and the testimony which you have just given refers to possibility two? A. Yes, sir.

Q. But you say possibility three. A. Yes; I
453 meant two.

Q. So that your testimony is that in respect to possibility two, where I, the donor, have merely a right against you, a claim in the future upon demand to establish usufruct, it is your opinion that under German law, a one-sided waiver is sufficient on behalf of the donor? A. Yes, sir.

Q. Going to possibility three, where I have a claim against you as donee, plus a further in personam right to call upon you to establish usufruct to secure personal claim. A. It is the same answer as in two. Possibility one would be correct because the basic principal part of possibility three is a contractual claim. A claim for security certainly depends and is contingent on the existence of a contractual claim, and therefore the waiver takes place by understanding.

Mr. Burling: May I note an objection? This goes not to the rules of evidence, but to a point of estoppel.

I would like to show for the record a motion to strike the testimony about waiver on the ground plaintiff was estopped. Now he is going to sue on waiver, and the witness who could testify about waiver is Wilhelm von Opel, and they took his deposition and he didn't say one word about waiver.

Now, he is dead and now we hear about waiver for the first time, and I think that raises estoppel.

454 The Court: I will hear you on that point.

Mr. Burling: I want to be heard on that point.

Mr. Boland: We can establish the right of the parties.

The Court: I will accept it, subject to the materiality of the facts of the case as developed later.

By Mr. Boland:

Q. In respect to this contract your claim against the donee, as I gathered it, it is German law that both parties must agree to the waiver? A. Yes, sir.

Q. And that you explain it has an informal meaning? A. Yes.

Q. Do you mean, express or implied? A. Express or implied.

Q. Either one? A. Yes, sir.

Q. So regardless of which of the three possibilities, if it is established, as a matter of fact, in the course of these proceedings that the parties both agreed to a waiver of whatever rights were reserved to the donor, then it is your testimony, is it not, that under such circumstances and under the opinion of the three possibilities, the right reserved in the donor would have been waived? A. Yes, sir.

Q. And permanent and forever? A. Yes, sir.
455 You only speak now of the German law.

Mr. Boland: This concludes, Your Honor, a portion of Dr. Kronstein's testimony. The second phase of his testimony is in respect to nationality, and we think it would be more in line with orderly presentation of proof if we were to recall this witness at a later date after the facts have been established, and have him testify further on nationality, which is a wholly different subject.

The Court: Is there any objection?

Mr. Burling: No; I would prefer it, and that we have cross examination of him on this part.

May I introduce Miss Magdalena Schoch, a member of the Bar of this Court. She was the first woman to be a professor of law at a German university. She has been a research associate of Harvard Law School and she is our law expert, and I asked her to sit with me.

The Court: All right.

Cross Examination

By Mr. Burling:

* * * * *

471 Q. Will you look at the last paragraph of Plaintiff's Exhibit 5? A. Yes.

Q. Did I understand you to say, on your direct examination, that notwithstanding the last paragraph of the instrument, title passed without any condition? A. I testified that this last paragraph has to be read together with the paragraph before. There are two possible interpretations you might give this paragraph. The one is, the interpretation which I give it, that it establishes contractual rights of the Opel parents, with the result that it is a condition on the transfer of title.

But then this condition is definitely killed and out of existence if Mr. Fritz von Opel sells the 600 or exchanges the 600 shares. Because under German law, if he takes it as a property right, it has to be absolutely exact; you cannot have property an indefinite thing.

472 Q. I wish to address myself to that contention of yours. If I understood you correctly, I could draw up an instrument giving my son my Rembrandt painting, providing, however, if he should predecease me, title would revert to me— A. Yes.

Q. And if he should predecease me, title would automatically revert to me? A. Yes.

Q. So that he took a title subject to a condition? A. Yes.

Q. Supposing I provided in the instrument that my son could exchange my particular Rembrandt, which I will say is the Man with the Golden Helmet, for another Rembrandt

he might like, and which he did, he exchanged the one Rembrandt for another Rembrandt, and then he died; what would happen to the title of that Rembrandt? A. Even in this very limited case you put, the exchange of one Rembrandt to another Rembrandt, I believe we have to interpret the abstract language of the German Code, whether the property rights, title rights, of the father would disappear. Of course, it has to be completely definite and clear and specific in what this right exists.

Q. Would not the Court, at the time the question was tested, listen to the facts; and if it could be estab-
473 lished that the first Rembrandt was in fact exchanged for the second, that then the Court would find that was a sufficient identification of the property? A. That is exactly what I did, in my testimony. I tried to find out, in my direct testimony, I tried to find out an interpretation, which is a gift of the Opel parents—

Q. I am talking about a Rembrandt, Doctor. A. Now, please, in this situation the Court would only say, in your case, that the son would have an obligation to the father to give him, or his estate, a Rembrandt which he finally had. But if the son sells this Rembrandt number three—

Q. Let us stick to the hypothesis I have put. It would be much simpler. A. Yes.

Q. Assuming there is a second Rembrandt, the son having exchanged the first Rembrandt for the second Rembrandt, and the Court hears testimony from the art dealer who says the son did this, and this is the Rembrandt which the son exchanged for the first one, wouldn't the Court then find that was sufficient identification of the painting, so that a property right existed upon the son's death? A. Not for property right—only for contractual obligations.

Q. You say you can never have a condition follow
474 a transfer of the property? That is, you can give property subject to a reverter, but no matter what

happens, if the property is ever transferred, that right in rem cases? Is that right? A. If the property is ever transferred? If the property, in your case, if the Rembrandt is sold and exchanged for another Rembrandt, the parties have to make a new Dinglicher Vertrag, a new conveyance, and have to say, "We hereby agree that the title in this new Rembrandt is substituted for the old title, and we agree title shall pass, or contingent title shall pass."

Q. Is it not true that you are expressing a minority view among German law experts? A. Such a point, I cannot tell you—expressing a minority. I think I follow my teacher and professor, Martin Wolff, along these lines And I believe he represents very much the majority of German law, and not the minority.

Q. You will, of course, agree there is a split of authority on this point? A. A legal question without split of authority is not difficult to find; but I am not aware of a split of authority, in my opinion.

Q. Are you not aware that there are decisions of the German courts on the question of tracing the continuity of the property? A. When property is given for
475 security, this problem is raised. There you might, in specific cases, imply from the very acts of the parties, it is agreed that the conveyance of last Rembrandt shall take place. But you have to show that; something has to happen. Just by the mere fact that you write that into a contract here, and do nothing more, I think that is a specific and abstract rule of the German property law and not to be reconciled with such an interpretation. I don't think so.

Q. You give no effect, then, to the words in the last paragraph on page 3 of the instrument—

"These stocks or the property substituted therefor including the income accrued but not drawn will then revert to the parents Opel or the surviving parent."

A. I give it certainly effect, as I testified in my direct examination. I think that the Opel parents have a claim against the son, or against the estate of the son, for whatever remains out of the gift after these contingencies occur. But as a matter of right in rem, I am unable to construe it.

Q. That is not what the words say, though, is it? A. That is not what the words say, no.

Q. You construe the instrument to mean something other than what the words say? A. If you don't do that, then this section has just no meaning and gives no rights
476 whatever to the Opel parents. It has no other alternative.

Q. Assuming your teacher, Dr. Wolff, is right on the law— A. Mr. Burling, Martin Wolff, in the field of property law, is right.

Q. Is he right as against an opinion of the Supreme Court? A. Yes; but there is no opinion on this point.

Mr. Burling: May I have a moment to confer with counsel, Your Honor? I just want to get the citation of the Supreme Court case, if Your Honor please.

I will come back to it. I can't find the citation immediately, Your Honor.

By Mr. Burling:

Q. Would you state the authorities that you rely on for your view that no property right would follow the substituted property, after the Opel shares were sold? I am again talking about the last paragraph of the instrument. A. By following very elementary and basic authorities, I have to construe through, under the principles of the Code—just a second—let me say it perfectly frankly—it is one of the most embarrassing things that a legal expert has to testify as we would discuss facts. We are dealing here with a legal problem. And I have to have a chance
477 to explain the whole legal theory.

Q. My question is, Doctor, what authorities do—

you rely on? A. My authorities, I will answer you, is the Code, and the entire principles of the German law.

Q. That is not very helpful. The fact is that we have a conflict, and the Court will have to decide between experts here in this case, and it would be helpful if you would tell us what sections of the Code you rely on. A. I would like to see a decision which is inconsistent with the statement which I made. The only explanation I have is that this opinion, this decision, you have, deals with other property.

Q. Doctor, I happen to be cross examining. You are not examining me, but I am examining you. I wish you would tell me what authorities you rely on.

Mr. Boland: Your Honor, I think it is very important, if Mr. Burling has a Supreme Court case contrary to the position taken by this witness, that instead of the witness being required to support what he says with authorities, that Mr. Burling should produce the decision right here and now.

The Court: I think he has the right to ask the authority.

Mr. Boland: He is assuming there is a split of authority.

The Court: No. He is asking if there is an au-
478 thority or a decision that he knows.

(To the witness): Doctor, have you looked that particular point up in the law, or are you just going on elementary principles?

The Witness: Oh, I looked it up.

The Court: Lately?

The Witness: Yes, lately. In fact, the day before I came into this Court, I went over all the points again.

The Court: You think you have some decisions on it?

The Witness: I have some Martin Wolff. I have the commentaries here. They said it is absolutely out of question that you can establish, under German law, an indefinite and unspecified right in any property. That is out of

question, said the Supreme Court decision, and does not exist.

The Court: Once more, I think probably you and he are talking about something different. I think what Mr. Burling is trying to get at is, assuming you had a picture, as you used the illustration, a Rembrandt picture, and had a provision in regard to it, such as in this last paragraph; and the evidence was overwhelming that that picture was swapped for another one, just exchanged for another one, and there isn't any doubt at all about the evidence.

The Witness: In such a case, if the facts are this, if I gave to my son a Rembrandt, and then he writes to me a letter—"Dear Father: I am buying another Rem-
479 brandt, and I would like to exchange Rembrandt number two for Rembrandt number one"—and it is fine; the parties make an agreement and understanding, that the new Rembrandt, the new picture, shall be conveyed to the father as of the death of the son.

The Court: Suppose he didn't write him, and this provision were in the agreement, you see, and he just swapped it and got another; then this wouldn't apply to it? Is that the testimony?

The Witness: In the case of this picture, you could, depending on the facts, how far the father saw the picture; whether he came there and was silent, or he said it was fine—you could there imply.

The Court: Yes; I understand your point; if it is indefinite, you cannot follow it and you cannot trace it and you cannot identify it. I understand your point. It has to be absolutely clear.

The Witness: It has to be clear absolutely without any doubt.

The Court: I have that point. But I think his idea is where there is absolutely no doubt about it, then would this provision apply?

In other words, would the obligation which attached to the original, apply to the substitute, when there is no doubt about it?

The Witness: The obligation, certainly, would apply.

480 The Court: I understand your distinction about whether it goes in rem or not.

The Witness: Whether it goes in rem is another question.

The Court: I understand that; but I think your question there is, isn't it, whether it would apply—

Mr. Burling: Your Honor understands me exactly.

The Court: Your answer is that it would apply, but it wouldn't vest a right in rem.

The Witness: If I represented the creditors of the stock, I certainly would make the point, and I think successfully, that that is the free property of the son.

The Court: I have your distinction so far.

The Witness: Under that, I admit there might be a very limited factual situation, such as Your Honor suggested. Where you have a picture, and the father is informed, or he sees it and silently approves, you might have a certain factual situation where you can say that the reconveyance or a new conveyance in regard to it exists. But you have to keep it very much in very limited lines.

The Court: Well, I got that.

Mr. Burling: The citation, if Your Honor please, which we refer to is Supreme Court, November 18, 1924, Volume 109, R. G. Z. 201.

The Court (to the witness): Do you want to make

481 a note of it?

The Witness: I would like to.

Mr. Burling: I am informed I might have given a wrong citation to the witness, Your Honor. I should have said Volume 136, pages 100 to 106, for the year 1932, decisions of the Supreme Court.

By Mr. Burling:

Q. What I am ultimately trying to get at, Dr. Kronstein, is, suppose this Court found as a fact that the proceeds of the Opel shares were put into a holding company, the Uebersee Finance-Korporation; that nothing else was put into Uebersee Finanz-Korporation, and that all the proceeds were put into Uebersee Finanz-Korporation; then wouldn't the reverter follow through the Opel shares into the Uebersee shares, assuming that the Court found that as a fact? A. I think, Mr. Burling, in my direct I testified that if the Niessbrauch is established, then this section here would certainly follow the property on which the Niessbrauch was established. Then there would be no property any more, because it would specifically and definitely clarify which property is covered by the contract.

Q. Now, you stated this morning, I believe, that you were familiar with Plaintiff's Exhibit 8, which is stipulated to be the Hachenburg draft of the gift agreement? A. 8?

482 Q. Plaintiff's Exhibit 8, the Hachenburg draft, A. Yes.

Q. And you have testified that Mr. Hachenburg was roughly the equivalent at the German Bar to John W. Davis at the American Bar, have you not? A. Yes.

Q. Is it not true that in his draft there is a provision for a reverter and calling also for a following of the property? A. Yes; but let us read that.

He clearly bases this section on this point, that they have nothing, that there can nothing happen to these shares, these Opel shares; that these Opel shares are exchanged into shares of the holding company.

Therefore he writes here, logically, that if he exchanged the shares into shares of the holding company, then the shares of the holding company shall be substituted. And he says, in Section 2, that the shares shall come into the

holding company if the father requests so, or if Fritz von Opel is doing it on his own motion.

Q. Now I ask you to address yourself, going back to Plaintiff's Exhibit 5, to the first paragraph on page 2, the so-called usufruct paragraph.

You have testified concerning various possibilities of construing the usufructuary provisions of this state-
483 ment, have you not? A. Yes, sir.

Q. And you say that the instrument itself did not bring a usufruct to light? A. Yes.

Q. Am I right in thinking that your reason for this is that no delivery to the usufructuary was made? A. This contract does not bring to light a Niessbrauch as a right in rem.

Q. That is right. A. As I testified this morning, it might bring in existence a claim.

Q. A claim to have a Niessbrauch? A. Yes. And the reason I say that, for the establishment of a right in rem, under various split ideas of the third part of the book, it would be necessary to give the Opel parents possession, or susbtitute of possession.

Q. And you say that the reason that the usufruct did not come into existence when this instrument was signed, was that there was no delivery of possession of the res to the Opel parents? A. As far as a right in rem is concerned.

Q. That is what we are talking about. A. As far as a right in rem is concerned, yes, it didn't come in existence, because there was no possession of the parents or
484 joint possession of the parents and Fritz von Opel provided for or established.

Q. Yes; I am talking now always about a right in rem. A. Yes.

Q. A true usufruct is a right in rem, is it not? A. This word "true"—

Q. I will withdraw the question and ask you, is a usufruct a right in rem? A. This general word, not always

is a usufruct necessary. But if you speak of a usufruct under section so and so of B. G. B., that is a right in rem.

Q. Thank you. And the reason the right in rem didn't come into existence is the failure of delivery for possession? A. Of possession.

Q. There is no other failure, is there, that you know of? A. If the usufruct is a right in rem, and suppose it is a right in rem, certainly some other section of this contract would be subject to difficult interpretation. For instance, in the section which says—

"In the event that the parents Opel shall not have drawn in full or in part the income from the shares accruing to them by virtue of their usufruct, the advancement to Fritz von Opel shall be deemed to have increased by the income not drawn and he shall be accountable therefore."

485 If it is a right in rem, then under German law the income becomes property of the Opel parents, and there was absolutely no need, it wouldn't make any understanding, for using such words.

Q. We will come to that, Doctor. Is there any defect in the usufruct other than failure of delivery? A. If you ask for defect, there is no other defect.

Q. Thank you. So that if delivery of res to Wilhelm and Marta von Opel took place on that assumption, then the usufruct came into existence and there was a right in rem in Wilhelm and Marta von Opel? Isn't that true? A. Yes.

Mr. Burling: Now, Your Honor, I would like to ask some hypothetical questions which in fact are based on the Gold case. It would, I think, since this is being tried without a jury, it would simplify matters if, rather than wait until I argue that point later, if I could point out pages in the Gold clause record to Your Honor at the time I ask the hypothetical questions, so that Your Honor will see that I am getting at, and how I believe the record binds the plaintiff.

I take it I am a—it is not in evidence; I cannot prove it—but the fact is that John W. Davis, who was referred to earlier, argued this case in the United States Circuit Court of Appeals in the Second Circuit.

486 If Your Honor please, I am about to question in relation to matters covered by the affidavit of Fritz von Opel, appearing at page 66 of the record:

By Mr. Burling:

Q. Let us suppose, Dr. Kronstein, the hypothetical case—And I have reference to folios 197 and 198, if Your Honor please—

Let us suppose that Fritz von Opel, acting under the power of attorney that has been identified, put the Opel shares to General Motors and obtained roughly $3,700,000, and used a part of that to buy a holding company, namely, the Uebersee Finanz-Korporation; and let us suppose he put the remainder of the proceeds into Uebersee.

And let us suppose that he then held all of the shares of Uebersee, except three shares which were qualifying shares for directors.

And let us suppose he put the shares into a safe deposit box in a bank in Zurich.

And let us suppose further that Fritz von Opel took the key of that box and delivered it to an agent of his father's—

Would that constitute, in your opinion, valid delivery of possession sufficient to create the usufruct? A. Yes, provided all the assumptions you mentioned, that X

487 was the agent of the father, and that this agent, as agent of the father, took possession; then certainly at this moment the Niessbrauch would be established.

Q. Very good. And at that time there would be a right in rem? A. There would be, I believe there would be my third possibility—and of course we would again come into difficulties, in five, this English translation of the gift contract. But it would be a claim of the Opel parents for in-

come, secured by a usufruct on the shares of Ueberseé which he would have at this time.

Q. Just a moment. I thought you testified, Doctor, that the only reason a usufruct did not arise under the first paragraph of page 2 was failure of delivery.

Now you have testified that my hypothesis, the delivery of the key to the safety deposit box, in which the shares resided, to an agent of Wilhelm von Opel, would constitute valid delivery. Why would not, under that hypothesis, why would not the usufruct arise at that moment? A. I told you, immediately after when you broached this question, I told you we now speak only of the first paragraph of page 2. If you speak of the whole agreement, you have to interpret page 2, this usufruct section, together with the section "In the event that the parents Opel shall not have drawn in full or in part" and so forth, and that
488 would lead to the interpretation that a right in rem was established the moment that this key was given to the agent of Wilhelm, if he was the agent; and the right in personam was established by making such delivery.

Q. In other words, you do agree that under my hypothesis, that Fritz von Opel delivered the key to Wilhelm's agent, and at the moment he delivered the key, the right in rem arose and it was complete? A. Provided, let me say, it was complete, provided the agent accepted the key and agreed that these parties agree that that shall be a usufruct—under this provision, yes, sir.

Q. Under that? A. Yes.

Q. And if the defendant can establish that the facts are in accordance with my hypothesis then you would have to agree, would you not, that the usufruct did arise under Plaintiff's Exhibit 5— A. Not under Plaintiff's Exhibit 5, because it would not arise from this agreement. From this agreement there would result a claim for the establishment of the right in rem, and the right in rem would be established by the delivery of the key and the agreement of the parties.

Q. In any event, if we agreed the key was delivered to the agent, as agent for Wilhelm, and the agent accepted the key for the father, then the usufruct did arrive? A. Then my possibility number two and my possibility number three would come into existence.

Q. I wonder if you wouldn't answer my question. Won't you agree, if we establish that Fritz von Opel delivered the key to Hans Frankenberg, Frankenberg acting as Wilhelm's agent, and Frankenberg accepted the key on behalf of Wilhelm, then at that moment the usufruct came into existence? A. Yes, I agree.

Q. You do agree? A. Yes.

Q. Now, you understand, do you not, that it is the contention of the defendant that Fritz and Wilhelm contemplated, at the time the agreement which is Plaintiff's Exhibit 5 was drawn up, that a holding company would be acquired; that the proceeds of the Opel shares would be put in the holding company, and the holding company symbolically was delivered to the father. That, you understand, is our contention.

Now, will you state what provisions, if any, of Plaintiff's Exhibit 5, are in any way inconsistent with Defendant's contention? A. The inconsistency is that it is not included in this contract—inconsistent with your explanation that it has been agreed. I only can testify as to the text of the agreement, or the agreement itself, which has no reference to such an understanding.

Q. The agreement itself is bare of any reference to a holding company? A. Yes.

Q. Is there anything, however, which is inconsistent with that hypothesis? A. No; there is nothing inconsistent.

Q. So, aside from the fact that the parties did not include in Plaintiff's Exhibit 5 a provision that the Opel shares or the proceeds thereof be put into a holding company, which in turn should be delivered to the father, there is nothing in Plaintiff's Exhibit 5 which tends to negate

the defendant's contention? Is that true? A. Since the contract says that if the shares should be sold or exchanged against other property, and so on, certainly any exchange might be possible, including said exchange into holding company shares. Therefore there is nothing inconsistent with such a procedure.

Q. I wonder if I cannot get a yes or no answer—at least a little closer to it. A. Yes, there is nothing inconsistent.

Q. There is nothing inconsistent between the provisions of Plaintiff's Exhibit 5 and the contention which I just stated to you? A. No.

491 Mr. Burling: May I have a moment, Your Honor?

By Mr. Burling:

Q. I will ask you to look once more at Plaintiff's Exhibit 7, please. I believe it has been stipulated that that is a letter which Dr. Hachenburg wrote to Geheimrat von Opel on October 3, 1931. Will you examine that and see whether there is anything in that letter which indicates that Hachenburg understood it was the intention of the parties to create a holding company? A. Yes, it was the understanding of Hachenburg, as the draft shows; and, furthermore, page 2 speaks of, or better, it says:

"My proposal is to have the holding company shares deposited for you. You will then be entitled to vote in the holding company, but only on such matters in which you have an actual interest."

So there is no doubt that Hachenburg's draft had in mind the establishment of the holding company. Whether that is the intention of the Opels or not, I do not know. But it is the intent of this letter and of the draft attached.

Q. I believe you testified this morning you were able to arrive at opinions as to the probable intent of the parties, on the basis of Hachenburg's draft. A. Certainly.